United States Court of Appeals

for the Second Circuit

APPENDIX

75-7170

United States Court of Appeals

For the Second Circuit.

JOSEPH RODRIGUEZ,
Plaintiff-Appellee,

against

OLAF PEDERSEN'S REDERI A/S,
Defendant and Third-Party Plaintiff-Appellee,

against

AMERICAN STEVEDORES, INC., and A. M. KRISTOPHER CO., INC.,
Third-Party Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

Volume II—Pages 369a to End.

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THE COURT: You may take the stand as soon as your client is through. The witness has answered the question containing the terms I asked him about. You did not know whether you were in hatch No. 3, did you?

THE WITNESS: When I left 4, the next hatch was 3.

THE COURT: The question said, "After you had walked the distance you reached the aft end of hatch No. 3."

THE WITNESS: That begins hatch No. 2.

THE COURT: You are in hatch No. 4 -- The Court will not question further.

Q Mr. Rodriguez, as you passed through this door, if you know, were you passing -- going past -- as you came through and went through the door and went forward, did you know whether or not you were going -- I'm sorry.

As you went through this door and started to walk forward, did you know or do you know now whether you were passing engine room casings?

Did you see anything that would indicate to you that you were passing engine room casings?

A I don't know.

54a Rodriguez - cross

THE COURT: What are "engine room casings?"

THE WITNESS: I don't know. I know what the engine room is, so the casings must be the foundations of the engine room.

THE COURT: If you don't understand the words that the lawyer uses, or any other lawyer or that the judge uses, do not just say yes or no. You are not being helpful. Ask what those terms mean.

Q As you passed through the door and walked forward, what did you notice as soon as you passed through what was to your left in point of view, if you recall?

A As soon as I left hatch No. 4, I realized I was in 3. That's all I know.

Q How did you recognize it as No. 3 hatch?

A Because I was in No. 2 and I know the difference from the hatch I was in. I knew that wasn't the hatch I was in.

THE COURT: You had been in hatch No. 2 and you came from 4 and you assumed you were in hatch No. 3?

THE WITNESS: Yes.

THE COURT: All right.

Q Is it your testimony that as soon as you went through this door you were in hatch No. 3?

A Yes, sir.

Q Now, did you recognize it as a hatch?

MR. KLONSKY: I object tothis.

THE COURT: Let him answer again.

A I didn't recognize it was a hatch, but I recognized it wasn't where I was working.

Q You recognized it as an area in which you had not been before; is that correct?

A That's correct.

Q But did you recognize it as a cargo hatch?

A No; I did not.

Q Did you know what it was?

A A passageway,.

Q What identified it to you as a passageway? How did you know it was a passageway?

A Because I walked straight and there was the floor there and nothing else, no walls, no cargo, no nothing, a place where you could walk straight.

Q What you call the deck of No. 4 hatch, would that be a passageway to you?

THE COURT: The deck of No. 4 hatch. Do

you know what that is?

Q The deck of No. 4 hatch.

A I don't understand the question.

Q Let me rephrase it for you then.

Would you assume with me that the plan which is here, Plaintiff's Exhibit 3 in evidence, indicates that as you pass from No. 4 forward on the starboard or offshore side --

A Yes.

Q -- it is not No. 3 hatch?

It is my understanding that you said that you thought you went from No. 4 into No. 3 hatch. I am asking you now how could you identify it as No. 3 hatch? What made you think it was No. 3 hatch? Just because it was forward of No. 4?

A That's correct.

THE COURT: I do not think the jury heard that.

(Question and answer read.)

THE WITNESS: I came from 4.

THE COURT: You were in 4 and you were going to 2. You pushed the door open and you thgught you were in 3?

THE WITNESS: Correct.

57a Rodriguez - cross

MR. KLONSKY: Could we have our afternoon recess now?

THE COURT: I think we will have a five-minute recess. Heed the admonition I have just given you.

(Recess taken.)

THE COURT: You may continue.

MR. KAIN: May I ask the reporter to read back the last two questions and answers?

(Testimony read.)

Q As you moved forward on the offshore side, as you went through this door, did there come a point when you passed through another door?

A Yes.

Q And how far, approximately, had you gone before you passed through this other door?

A I don't know.

Q If you know, was it immediately before you got to No. 2 or was it some period of time before you got to No. 2?

A Immediately.

Q Is it your testimony that you came through this door, the second door, and you were then in No. 2?

A Yes.

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Q When you went through this door in the forward end of No. 4, was there a coaming across the entrance? Do you know what I mean by coaming?

A Yes, sir.

Q Was there a raised --

A There was.

THE COURT: You said something about across the entrance?

MR. KAIN: Across the entrance on the deck. Did you have to step over something or was it flat?

A I don't remember.

THE COURT: Where was the coaming?

THE WITNESS: In the square of the hatch.

Q I am speaking only of the fire door that you say you pushed open and passed through. Was there a threshold or a coaming, an elevated section across the entrance of the doorway?

THE COURT: The threshold is one thing and a coaming is another. We have testimony that the coaming is five to six inches high and a threshold -- I don't see one here -- is less than an inch in height in the vernacular as people use it.

The question you put earlier was better.

As you pushed this door open, and walked through, did you have to step over something at the bottom of the door?

THE WITNESS: No.

THE COURT: There was no coaming there?

THE WITNESS: No.

THE COURT: Nothing five or six inches high or less?

THE WITNESS: No.

THE COURT: All right.

Q Now, as you walked through, did you see anything lying on the deck that you were walking on, either ahead of you or to either side of you?

A I don't remember.

Q Did you see any ventilation pipes -- vertical piping from overhead to where you were walking on the deck which you were walking on?

A I didn't see any pipes.

Q Just a clear area?

A Yes.

Q Was there any debris or any substances of any kind on the deck on which you were walking?

A There were some boards there.

THE COURT: Wait a second. Boards that were part of what you were walking on, or boards scattered around?

THE WITNESS: There were a few boards scattered around. I don't remember, but I know there were boards scattered around.

THE COURT: What was the substance on which you were walking?

THE WITNESS: Steel.

THE COURT: There were no boards on top of the steel?

THE WITNESS: Just strips of boards.

THE COURT: Dunnage?

THE WITNESS: Yes.

Q When you first came through the door, did you flash your light down?

A No, I had some light from No. 4.

Q As you progressed into this area, it was very dark, wasn't it?

A Yes.

Q Actually, this flashlight that you had which was half an inch or an inch larger than the one exhibited to you yesterday, you had to shine it down to see where you were going? You couldn't move it around?

A I shined it straight.

THE COURT: That is not the question. The question is: Did you have to shine it down in order to put your feet?

THE WITNESS: No, because --

THE COURT: He says, "No."

Q Did you shine it around at all?

A Just straight.

THE COURT: Just straight ahead?

THE WITNESS: Straight.

Q You didn't have to shine it as to where you were walking on the deck?

A I saw that there was some dunnage and I walked on some of the dunnage and on the deck.

Q When you went a considerable distance from No. 4 to number 2, you couldn't see --

(Mr. Klonsky rises.)

MR. KAIN: You are not going to object while the question is being put?

Q (Cont'g.) -- you couldn't see from the light of No. 4, after you had moved into this passageway or area, could you?

MR. KLONSKY: Objection.

THE COURT: The exhibit is in evidence.

I cannot read the figures from this distance. Mr. Klonsky, would you step forward and together with Mr. Kain tell us what the distance is on the diagram from the forward end of hatch 4 to the aft end of hatch 2.

Is that a considerable distance that you are speaking of?

MR. KAIN: Yes, Your Honor.

THE COURT: What does it read?

MR. KAIN: It is drawn to scale. It will have to be done with a ruler.

THE COURT: Give him a ruler.

Can we agree as to the distance he had to go from the forward end of hatch 4 to the aft end of hatch 2?

MR. KAIN: In excess of 100 -- I would guess about 150.

THE COURT: Over 100 feet is the distance and possibly considerably more than 100 feet from the first door through which you passed. According to your testimony, that would be the forward end of hatch 4 to the second door which is at the aft end or rear end of hatch 2.

MR. KAIN: Your Honor, I am not giving this measurement -- I do not concede that the second door --

THE COURT: His testimony.

MR. KAIN: All right.

Q As you passed through the first door, how far had you walked forward before you were in a very dark area, as you passed through the first door at the forward end of No. 4?

A Maybe about 20 feet.

Q And from there on forward to No. 2 you were walking in avery dark area?

A Yes, I was.

Q Now, as you walked forward, after you passed through the door at the forward end of No. 4, what, if anything, did you see other than the deck on which you were walking before you passed through the second door?

A The first thing I saw was a refre box.

Q From the time you passed through the first door -- I do not want to confuse you -- you said you saw some boards.

THE COURT: Dunnage boards on the floor.

Q Did you see anything but dunnage boards from the time you walked through that first door until you say

you saw the refre box?

A All I remember I saw dunnage.

THE COURT: That was on the floor?

THE WITNESS: Yes, sir.

Q Did you pass by any cargo of any kind?

A No, sir.

Q Did you see any hatch openings in No. 3 as you went through?

A I walked on a straight path and there was no hatches there.

THE COURT: That isn't the question. Did you see any hatch openings?

THE WITNESS: I couldn't see any.

THE COURT: Then you didn't see them, if you couldn't see them.

Q Did you flash your light around at all (indicating)?

THE WITNESS: From side to side is the gesture.

A Straight ahead.

Q When you went through No. 4 hatch, did you see any tank top covers?

THE COURT: Do you know what he means?

THE WITNESS: No, I don't.

Q Do you know what a deep tank is?

A No, I don't.

Q Did you pass by any openings in the deck on which you were walking?

A I don't know what you mean.

Q Did you see any openings with covers on them on the deck you were walking on?

THE COURT: Now, you say with covers. Did you see any covers, like manhole covers?

THE WITNESS: Don't remember.

Q Did you see any padeys on the deck? Do you know what a padey is?

A Yes.

Q Did you see any of those on the deck?

A I don't think so.

THE COURT: Tell the jury what a padey is.

THE WITNESS: From my knowledge, a piece of metal coming up and over (indicating).

THE COURT: A piece of steel like a hook into which a hook fits.

Q Did you at any time see the skin of the ship? Do you know what I mean by "the skin of the ship"?

A Yes.

Q That's the side of the ship.

A Yes.

Q Did you see that at any time?

A As soon as I opened the door I did.

THE COURT: Did you see it after that?

THE WITNESS: Excuse me?

THE COURT: Did you see it after that?

THE WITNESS: No.

THE COURT: He means only when he opened the door. That is why I asked the question.

Q Did you at any time while you were walking forward see any sweat battens? Do you know what they are?

A No.

Q Did you see any wood on the ship's side held in place by metal clips?

A When I opened the door I did see them.

Q As you walked forward, did you see any?

A No.

THE COURT: Did your light fall on any of them, so you could see them?

THE WITNESS: I don't remember.

Q Did you see any escape trunks?

Do you know what I mean by "escape trunks?"

A MAnholes that lead up.

Q Closed ladders, trunks?

A No.

Q When you passed through this second door, as you walked forward, did you have to open that door?

A No.

Q Did you know you were passing through a door?

A Yes.

Q And could you describe that door for me? Was it the same type of door as you first passed through?

A All I know there was a doorway there.

THE COURT: Do you know if there was a door there?

THE WITNESS: I don't even know if there was a door.

THE COURT: You do know there was a doorway?

THE WITNESS: Yes.

Q What identified it as a doorway to you?

A Well, I saw the refre box and as soon as I walked through this doorway I saw the refre box where I worked and I remembered there was a doorway.

Q As you came into No. 2 hatch, you say you saw the refre box?

A Yes, sir.

Q What identified it to you as the refre box as

you first entered the hatch?

A As soon as I left the doorway there was a piece of steel there, a square box. I ran my hand across it and felt it and I knew I was in the hatch.

Q You felt along the wall of this refre box with your hand?

A Yes.

Q As you came into No. 2, was the door of the refre box visible to you?

A I saw it with my light, yes, when I got into the hatch.

Q I said as you first came into it.

A No, sir.

Q Did you recognize the refre box when you first came into it?

A Yes, sir.

Q And what identified it to you as the refre box?

A The handle on the refre box.

Q Was the handle on the refre box on the door?

A Yes, sir.

Q Is the door or was the door of the refre box in the upper 2 tween deck on the forward side of the refre box or on the side -- the offshore or inshore side?

A On the offshore side.

Q Are you telling me that in going into this refre box you went into this box from the side?

MR. KLONSKY: I object. I do not know what reference he has to this. When he goes in where?

THE COURT: Overruled. Read the question back to the witness, please.

(Questinn read.)

THE COURT: Did you go into the refre box from the side?

THE WITNESS: I didn't go into the refre box.

THE COURT: You were in the refre box earlier that day, were you not?

THE WITNESS: Yes, I was.

THE COURT: Did you go from the side?

THE WITNESS: From the front, not from the side.

Q Isn't it true that the door of the refre box is in the front of the refre box?

A Yes, sir.

Q And when you came into No. 2, you passed the side of this refre box, did you not?

A Yes.

Q At that time did you recognize it as a refre box?

A As soon as I turned around and I saw the handle, I recognized it.

Q You turned around?

A Yes, sir.

Q At what point were you -- were you in No. 2 when you turned around?

A Yes.

Q Had you gone forward of this refre box when you turned around?

A I was feeling alongside of the wall of the refre box.

Q Why were you feeling alongside of the wall, because you couldn't see where you were going?

A I could see, but it was safer that way.

Q What was there on the side wall of this refre box that identified it to you as the refer box?

A The handle of the refre box.

Q The handle for what on the refer box?

A To open the refre box.

Q Didn't you just tell me that the handle was on the front?

A That's correct.

Q As you felt along the side of this refre box, what identified that to you as the refre box?

A It was a square piece of -- there was walls of metal that formed the reefer box.

THE COURT: Incidentally, this part that you were following, you say you had your hand on the side of the reefer box. Does that mean that the path you were following ran alongside of the side of the reefer box?

THE WITNESS: Could I demonstrate it a minute on this wall?

THE COURT: Answer my question.

THE WITNESS: I can't answer it.

THE COURT: All right.

Q As you moved forward towards No. 2 hatch when you got in the area just after the refre box -- I am referring to this print which is Plaintiff's Exhibit 3 in evidence. Will you assume with me and it is shown on this plan. You may come down and look at it if His Honor will permit you. There is a solid bulkhead running along here, which includes the baggage room, the refrigeration machinery, and the very forward end of this bulkhead is this refre box. What I want to know is, as you

pass by here, what was there about the forward end of this entire bulkhead that identified it to you as the refre box? What if anything?

A The size of the refre box, the walls.

THE COURT: What is a bulkhead as just used?

THE WITNESS: I understand --

THE COURT: As used in the question you just answered.

THE WITNESS: The bulkhead that I know is the one that comes -- I understand the question, but --

THE COURT: Is the bulkhead a piece of apple pie or what is it?

THE WITNESS: Just where the cargo is stored, the very beginning.

THE COURT: Is it a wall?

THE WITNESS: Yes, it's a wall.

THE COURT: Members of the Jury: the terms that are used in maritime activity are also used in ordinary speech, but they have different meanings.

MR. KAIN: May I rephrase the question --

THE COURT: Yes.

MR. KAIN: -- so the witness is not confused.

THE COURT: Suppose you use the maritime word and the word that the jury would understand and we can be sure the witness understands it too.

Q Mr. Rodriguez --

THE COURT: Step down and look where he is pointing. The Exhibit is in evidence. The jury ultimately will see it. They can see it now, but not as clearly.

Q I am referring, Mr. Rodriguez, to this bulkhead or wall that comes right along here (indicating).

Do you see it?

A Yes.

THE COURT: Do you see the bulkhead there?

THE WITNESS: Yes.

Q This solid line (indicating).

MR. KLONSKY: Does that run fore and aft?

MR. KAIN: Yes.

Q Do you see that?

A Yes.

Q Do you notice here it says "baggage room, 925 cubic feet?"

A Yes, sir.

(Continued on next page.)

Q Do you notice this "R-e-f-r-e?"

A Yes, sir.

Q Do you notice this "cargo refre room?"

A All I know --

Q I am reading off the print.

As you walked forward along this wall or bulkhead on the side of it --

A Yes, sir.

Q -- what was there on the bulkhead you said you felt along? What was there that identified this portion of the bulkhead or wall as the outer wall of the refre box? How did you know it was the refre box and not the machinery space or the baggage room or some other room?

A I got into the hatch -- I didn't feel nothing along the sides. All I did -- I got into the passageway, the doorway there where the refre started, and then I felt around the refre. I didn't go in here or any place (indicating). I just went straight when I got through the passageway where the door was. The left side here is where the refre box began.

THE COURT: Come back to the stand here and I will ask you a question.

(The witness returns to the witness stand.)

THE COURT: Correct me if I do not accurately state what you testified to.

As you walked through this passageway in the area indicated, you came to the side of the refre box, you continued along that side until you came to the end of the side and then you testified earlier you turned around.

THE WITNESS: That's correct.

THE COURT: Meaning you turned towards the refre box?

THE WITNESS: Towards the front.

THE COURT: Towards the front of it?

THE WITNESS: That's correct.

THE COURT: The entrance where you got into earlier in the day and that's where the handle was that enabled you to recognize that it was a refre box?

THE WITNESS: Yes, sir.

THE COURT: Un until that point, as you were feeling your way along the sides, did you know it was the refre box?

THE WITNESS: No, I didn't know.

THE COURT: Not until you turned around. When you were at the front of the refre box you

saw the handle or felt the handle, which is it?

THE WITNESS: If I could explain it this way: When I left Hatch No. 3 --

THE COURT: Never mind. You are at the refre box.

THE WITNESS: That's No. 2. As soon as you leave No. 3, you are in 2.

THE COURT: You suspected, but when you saw the handle you were sure?

THE WITNESS: Yes.

Q As you walked forward, did you see any other walls or bulkhead other than the bulkhead which contains the refre box and these other compartments?

A No, sir.

THE COURT: Could you see your hand as you ran it along the side of the refre box?

THE WITNESS: I didn't stop to look at my hand, just felt the wall.

THE COURT: You were feeling the wall . Was the light on your hand?

THE WITNESS: No, sir.

THE COURT: The light was not on the side of the refre box?

THE WITNESS: No, sir.

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MR. KLONSKY: Could we mark where he designated the refre box?

THE COURT: The exhibit indicates it. He spelt it out.

Q Did you shine your light on the refre box door before you recognized it as the refre box?

A Not before I recognized it.

Q You recognized it as the refre box before you shined your light on it?

A I assumed it was the refre box before I shined the light.

Q What made you assume?

A As I walked out of No. 3 into No. 2, the first thing was a refre box.

Q As you reached this corner here, the forward corner of this wall or bulkhead on the starboard side -- the outboard side of this refre box, could you see anything forward of you which indicated to you that you were in No. 2 hatch?

A When I got into the hatch the refre indicated I was in 2 hatch.

Q As you reached this point, this forward starboard corner, you did not know it was the refre box, did you?

A As soon as I walked in I knew it was the refre box.

Q Did you not just tell me that there was nothing that identified it on this bulkhead to you as the refre box -- this bulkhead or wall?

A The doorway I came in from 3 to 2. As soon as I walked in there I was in 2. The refre box was on the left.

THE COURT: The surroundings were familiar?

THE WITNESS: Correct.

THE COURT: You had worked there that day?

THE WITNESS: Yes.

THE COURT: All right.

Q Where was the ladder that you left No. 2 upper tween deck located?

A I couldn't remember now.

Q Was that on the same side?

A I don't remember now.

Q Did you at any time before your accident -- during the period from the time you left No. 4 until your accident happened see the ladder that you went up on?

A I don't remember.

Q Did you walk forward of this bulkhead, the forward end of this refre box at all? Did you go forward of that?

A Yes.

Q How far forward of that, approximately, did you go?

A I don't know.

THE COURT: How many steps?

THE WITNESS: I don't know. I know I walked out a little bit and fell down.

THE COURT: Was it as many as fifty steps or as few as two?

THE WITNESS: A few.

THE COURT: A few?

THE WITNESS: Maybe five.

THE COURT: Beyond the door of the refre box?

THE WITNESS: Yes.

Q Mr. Rodriguez, as you came along this starboard bulkhead or wall containing these compartments in addition to the refre box, you couldn't see the door until you were some place forward of the box itself, could you?

A Yes, I could have seen the door because I felt around it.

Q Are you telling me the door is right at the corner?

A I felt the wall around it and as I turned the handle

was there and I was right on the refre.

Q Is it your testimony that the handle for the door of this refre box was right in this corner?

A It's in the front of the refre.

Q How far across, approximately, is the handle for the door of that refre box?

A In the middle of the refre.

THE COURT: I think you testified today the refre box was 10 feet --

THE WITNESS: I'm saying that's the dimensions it's to me. I took a rough guess.

THE COURT: How high is it?

THE WITNESS: The size of that desk (indicating). I don't know how high it was.

Q Could you tell me how the refre box door was secured or was it closed?

A I don't know. I just know that I saw the handle and it could be a clasp on the handle.

Q Was it a straight bar handle or was it a wheel?

A I don't know now.

Q When you looked back towards the refre box door, how high above the deck level was the refre box door handle? How high above the deck on which you

were standing?

A About four feet.

Q About four feet?

A About four feet.

Q Now, immediately in front of this refre box dor was what?

A The handle.

Q If you opened the refre box door, took the door out of the way, how far forward of the entrance to that refre box was the hatch square of the upper tween deck?

A I don't know. I don't know how many feet it was.

Q Was it more than one foot?

A More than one foot, yes.

Q Was it more than two?

A I don't know.

Q Did you use your light at all in locating this door handle that you say you saw?

A Yes.

Q And you turned around and looked back towards this door?

A Yes, sir.

Q So you were forward of the box and you turned around to look at the front of the box?

A That's correct.

Q Is that right?

A Yes, sir.

Q Did you shine your flashlight at the box door?

A Yes, sir.

Q Did you then at that time notice there were no hatch boards on the hatch square immediately forward of the refre box door?

A I didn't see anything back there. I was just looking at the refre door.

Q Did you shine your light down to see how much space you had forward --

A I was looking --

Q (Cont'g.) -- of the refre box door?

THE COURT: Just answer the question as put. Read the question back.

(Question read.)

THE COURT: Did you shine your light down? That's the question.

A I shined my light down, yes.

Q Did you at any time before your accident go over to a portion in front or forward of this refre box door?

A Yes, sir.

Q And that means you went from somewhere even

with this bulkhead or outboard of this bulkhead or wall -- may I ask the witness to come down and indicate with a pencil where he was standing when he turned around and looked at the refre box door?

THE COURT: Yes.

(Witness leaves witness stand.)

THE COURT: For that purpose we will have him mark it with a red pencil. Put a cross mark where he puts his finger, (addressing the clerk).

MR. KLONSKY: He just said he doesn't know how to read these plans.

THE COURT: Take the stand.

MR. KLONSKY: Could we mark the refre box?

THE COURT: It's indicated on the plan. I assume there is just one refre box there.

MR. KLONSKY: There are several places.

MR. KAIN: It's labeled "cargo ref."

THE COURT: Does it show that it is in the No. 2 hatch?

MR. KAIN: Yes, it's the only one.

MR. KLONSKY: Immediately forward there is another one.

THE COURT: Is it in the No. 2?

MR. KLONSKY: Yes.

(Whereupon, the Court leaves the bench.)

MR. KAIN: May we take a red pencil and put it under the confines of the box?

THE COURT: No. You have the witness under cross-examination. If he cannot use the map, he cannot use it. You will have to find some other way, but not through this witness.

MR. KLONSKY: We can stipulate to this.

THE COURT: Stipulate at some later stage. The witness is under cross-examination.

(The Court returns to the bench.)

Q You told us that you turned around and looked back and you recognized the refre box door; is that correct?

A Y es, sir.

Q And you shined your flashlight on this refre box door and you saw the handle; is that correct?

A Yes, sir.

Q And you told me you did not recall at this time what kind of handle it was?

A I guess so. It has to be correct.

THE COURT: We will leave Pearl White hanging on a cliff until Monday at ten o'clock. There is no session of this trial to be held tomorrow. I have a full day and I told the lawyers that I would announce it earlier, but I forgot.

However, there will be no session until Monday at ten o'clock and I admonish you, as I have repeatedly done, not to talk about this case among yourselves, not to discuss it with anyone else, and do not be where it is discussed. It is not a proper subject for table talk. Do not make any weekend trips on ferry boats in order to familiarize yourselves with maritime practices and do not go near any of the addresses which have come into the record thus far. I think some have. Be punctual Monday. We will start at ten o'clock.

(Jury leaves courtroom.)

MR. KAIN: Before we adjourn, if it is appropriate, may I ask that the witness be admonished not to discuss the case with anyone?

THE COURT: Counsel, you will have to get the Supreme Court to repeal the First Amendment.

MR. KAIN: Thank you, Your Honor.

THE CLERK: Court stands adjourned until ten o'clock Monday morning.

(Whereupon, an adjournment was taken until Monday, February 21, 1972, at 10:00 o'clock a.m.)

* * *

(Witness excused.)

MR. KLONSKY: Mr. Rodriquez, would you take the stand, please.

THE CLERK: Mr. Joseph Rodriquez resumes the witness stand.

You are still under oath, Mr. Rodriquez.

J O S E P H R O D R I Q U E Z , having been previously duly sworn, resumes the witness stand for further examination.

MR. KAIN: May I continue, Your Honor?

THE COURT: I don't hear you.

MR. KAIN: I say, may I continue?

THE COURT: Is this a continuation of his cross? Is that it?

MR. KAIN: Yes.

THE COURT: All right. I thought he was being put on for some purpose here.

CROSS-EXAMINATION

BY MR. KAIN:

Q Incidentally, Mr. Rodriquez, what kind of card did you have -- longshore card did you have on July 3, '67?

A Medical.

Q What?

A A medical card.

MR. KLONSKY: May I have that question and answer read?

THE COURT: Yes.

(Record read.)

MR. KLONSKY: I don't know if he means after or before --

THE COURT: Neither do I. Continue with your questioning.

BY MR. KAIN:

Q You told us when we discontinued on Friday afternoon, Mr. Rodriquez, did you not, that you had come forward into this (indicating) along the offshore side --

A Yes, sir.

Q (Continuing) -- of this ship, the Sunny Prince, and eventually or ultimately you got into No. 2 upper 'tween deck; is that correct?

A Yes, sir.

Q And you went forward to a point where the reefer box door was behind you; is that correct?

A Yes, sir.

Q You then looked over your shoulder and with your flashlight, the small light you were carrying, you saw the reefer box door; is that correct?

A Well, I turned and saw the reefer box door.

Q You turned and saw the reefer box door?

A Yes, sir.

Q You did not see the missing hatchboards from the hatch square in front of or forward of this reefer box door; is that correct?

A No. I couldn't see.

Q Sir?

A I couldn't see.

THE COURT: What prevented you from seeing?

THE WITNESS: Because I had my back towards the hatch.

MR. KAIN: May I have that answer read?

THE COURT: Yes. Suppose you read the question and the answer.

(Record read.)

BY MR. KAIN:

Q You turned to look towards this reefer box door; is that correct?

A Yes.

Q Now, when you turned to look towards the reefer box door, were you still offshore?

A Yes, sir.

Q And in looking towards the reefer box door,

you had to, in effect, look behind you; did you not?

A In front of me.

THE COURT: Well, as you turned, which direction were you facing?

THE WITNESS: Towards the reefer box door. So, as I turned, I was facing it.

THE COURT: Well, then, your eyes were looking in front of you, I suppose.

Q I understand that, but you were looking behind the position you were in before you turned; is that right? In other words, you turned around and you looked behind you towards the reefer box door; is that correct?

A Yes. But I wasn't completely turned.

Q You were partially turned; is that right?

A Partially turned.

THE COURT: Which way were you looking before you turned?

THE WITNESS: I had my back towards the reefer box.

THE COURT: Therefore, you were looking towards the forward part of the ship?

THE WITNESS: Yes, sir; that's right.

THE COURT: Then you turned?

THE WITNESS: Yes, sir.

THE COURT: And then you say the reefer box was in front of your eyes, that you had then turned around?

THE WITNESS: Yes, sir.

BY MR. KAIN:

Q When you turned to look at the reefer box door, did you turn inshore? Do you know what I mean by: "inshore", inboard?

A No, I don't know what you mean.

Q You were walking on an offshore side of the ship. The left side of the ship was to the pier you were on, the port side. You were on the starboard side; is that right, the offshore side?

A The offshore side.

Q And as you walked forward, the reefer box was to your left when you got into No. 2 hatch; is that not so?

A Yes, sir.

Q When you stopped and turned or when you turned did you turn towards your left or did you turn clockwise around in this fashion (indicating)?

A I don't remember now.

Q In any event, after you had turned, you were facing aft, looking at the reefer box door; is that correct?

A Partially.

Q Well, you were facing inshore, then, were you, looking at the reefer box door?

A I was offshore, facing inshore.

Q And as you faced inshore, the reefer box door was to your left; is that correct?

A That's correct.

Q What was directly ahead of you?

THE COURT: You mean after He turned or before?

Q After you turned and were facing inshore.

A There was nothing there

Q The hatch square was there; wasn't it?

A Well, after I went down. That's all I know.

Q Well, Mr. Rodriquez, while you were working there that morning, isn't it true that the hatch square was approximately two feet forward of the reefer box door?

A I don't remember. It could have been.

Q And is it your testimony that you were looking at this reefer box door but you did not see the hatch which was two feet forward of it?

A Yes, sir.

THE COURT: All right. I'll modify that question. The witness has just testified that he didn't know -- I'll withdraw that and I will

put it in the form of a question:

As you turned, how far was the hatch -- was the hatch square in front of you, the beginning of the hatch square?

THE WITNESS: Well, all I know is I was stepping on a hard foundation. Then, when I turned around, that's when I fell down. I don't know how far it was.

THE COURT: The square doesn't move. You are being asked how far were you from the hatch square, the nearest part, irrespective of whether it was covered or uncovered?

THE WITNESS: A few feet. I don't know how much.

THE COURT: A few feet?

THE WITNESS: Yes.

THE COURT: All right.

Q After you turned around and saw this door, what did you do then?

A Well, I flashed the light down toward the door and I went to kneel, looking for my gloves, and that is when I lost my balance.

Q You lost your balance?

A Yes.

Q What happened then?

A I hit the bottomof the ship.

Q Were you backing up at the time you fell into that hatch?

A I was moving in a sideways motion.

Q Well, let me take this step by step. You can correct me if I am incorrect on this.

When you came into No. 2, you say you reached a point where you turned and you looked towards --

A The reefer.

THE COURT: He said "the reefer."

Q The reefer door; is that correct?

A Yes, sir.

THE COURT: Keep your voice up.

Q Now, what did you do thereafter, after you had turned and started to look to the reefer door?

A Well, I walked alongside the reefer door.

Q You walked alongside the reefer door?

A Yes, sir.

Q You were offshore at the time that you saw it?

A Yes, sir.

Q You then walked towards it; is that correct?

A Yes, sir.

Q And in walking towards it, you walked between

this hatch combing on the 'tween deck and the reefer door; is that correct?

A That's right.

T4 Q As you came up to that portion of the upper 'tween deck situated between the after hatch combing, the piece of the combing that was across the after part of the hatch square and the reefer box door, how much space was there between the reefer box and that combing?

A A few feet.

THE COURT: The nearest part of the reefer box to the nearest part of the combing.

THE WITNESS: A few feet. That's all I know. A few feet.

Q About two feet?

THE COURT: A few feet. He said: "A few feet."

Q Did you see the combing as you came up towards it?

A Well, when I went to step on the combing, my -- like I put my foot up on the combing, and one was down. When I went to turn around that is when I lost balance.

Q Let me take you back to the position where you turned and saw this door.

Could you describe for me what you then did? Did you

walk directly forward towards the door?

A I went towards the door and I put my hand on the door. Then I started shining the light down.

Q HOw far away was the door from you at the time you went towards the door?

A I had my hand on the door.

Q You had your hand on the door?

A Yes, sir.

Q In getting to the door, what did you do? Did you just walk forward with this light?

A Well, I turned, turned halfway and started backing up so I can see the ground where I was at, and I lost my balance there.

Q I don't think I understand you. May I go over this again with you, Mr. Rodriquez?

You say you turned and walked towards this door. Did you continue to walk forward until you put your hand on the door or did you turn your body in some other direction or do something else?

A If I could demonstrate it, I probably could show you better. In speaking about it, I can't. I can demonstrate along the wall here.

MR. KAIN: May the witness do so?

THE COURT: All right. He indicated the

front of the Jury box.

(Whereupon, the witness leaves the witness stand.)

THE WITNESS: I was walking through the passage this way with the flashlight (indicating). Here's where the reefer box is (indicating).

THE COURT: Indicating with his left hand. He is walking parallel with the reefer box.

THE WITNESS: I came this way with the light down and I shined my light towards the handle.

THE COURT: The witness turns, makes a left turn, and indicates with a hand holding the light with his right, shining it down alongside the door of the reefer box.

THE WITNESS: That's correct. So, I saw the handle. As I turned around this way, I don't know how, but I came a few feet up --

THE COURT: The witness now moves until he is at a point about three feet beyond the point of the door, and he has completed or partially completed the rest of his turn so that he is now facing the door and flashing his light down

to the door; is that correct?

THE WITNESS: That's correct, sir.

THE COURT: All right.

THE WITNESS: So, when I went to put the light down and turn this way (indicating), when I went to go down to look for the gloves --

THE COURT: The witness bends over and points tothe ground by the reefer door, and steps back.

THE WITNESS: That is when I went down.

THE COURT: That is when you went down. Have I described your movements correctly?

THE WITNESS: That's right.

BY MR. KAIN:

Q Mr. Rodriquez, this jury box rail that you have been describing, you indicated that this represented the the outboard bulkhead of that reefer box as you came into the hatch?

A Well, I came into the hatch and I saw the reefer box wall there.

Q That is the side --

A Yes, sir.

Q The offshore side of the reefer box?

A Yes, sir.

Q Is that correct?

A That's correct.

Q And there came a time when you came to the end of this offshore side of the reefer box and you indicated you turned like this (indicating)?

A Yes, sir.

THE COURT: Indicating a half turn to the left.

Q A half turn to the left. When you turned a half turn to the left and shined your light, you say you saw the handle of the door?

A On the reefer box, yes.

Q On the reefer box.

Now, how far along the forward wall or bulkhead of that reefer box was the door located?

THE COURT: Are you saying "door" or "handle"?

Q The door.

A I don't know. I know I --

Q It wasn't right at this corner; was it?

A I don't remember now.

Q You don't know where along this --

A No, I don't.

Q Did you then continue turning so that your

back faced forward and you were facing towards the forward wall or bulkhead of the reefer box?

A Well, I didn't have my back completely turned. I was semi-turned.

Q Semi-turned?

A Right.

Q Did you then move towards the reefer box door?

A No. I moved back to see where I was at, to see if I could see the ladder. When I moved back, that is when I fell down.

Q Had you turned inboard or to the left from this corner of the reefer box, the offshore? Had you gone any distance in from there or were you out there at this corner at the time of your accident?

THE COURT: Indicating the corner of the side and front of the reefer box.

MR. KAIN: The offshore side and front, Your Honor.

A I couldn't remember clearly. But I think I took a few steps in, inshore.

Q In what direction did you take the steps? Sideways, backwards? What did you do?

A I don't remember.

THE COURT: If you are turning left,

well then, you were proceeding generally in the direction of the opposite side of the ship.

THE WITNESS: Yes, sir.

THE COURT: Were you not? That would be the inboard side?

THE WITNESS: Yes, sir.

BY MR. KAIN:

Q Now, Mr. Rodriquez, you told us the other day when you left the hatch, you took off your gloves, put them with your hook and threw them on the deck near the after ladder and No. 2 hatch?

A That's correct.

Q Now, was the after ladder anywhere near where you were at the time of your accident?

A I can't remember at this point.

Q You didn't expect to find your gloves and your hook at this reefer box door; did you?

A Not at the door.

Q You expected to find them where you had left them, adjacent to the ladder at the after end of the hatch; is that correct?

A In that vicinity.

Q But you don't now recall where that ladder was located; is that correct?

A I don't remember now.

Q Do you remember, Mr. Rodriquez, your testimony under oath at my office on May 13, 1969? Page 41, line 11, do you remember being asked this question:

"Question: After you came into the hatch, No. 2 hatch, what happened?"

And did you give this answer:

"A Well, I saw the refer box. Then I had the flashlight over to the handle, the way you move the handle up and down to get in. I figured that was the same hatch that I was in."

Do you remember being asked that?

A Yes, sir; I remember.

Q That question and giving that answer?

Were you asked this question:

"Q When you say 'the handle up and down,' are you referring to the handle of the reefer box?"

And did you give this answer:

"A Yes, that's right."

A Yes. I said that.

Q And were you asked this question:

"Q Would you go on, please?"

And did you give this answer:

"A Then I started shining down, looking for the

gloves and hook. When I started, I was going like this towards backwards, feeling this way, backwards. I knew we left the hatch covers on. I didn't think the hatch covers were off. And when I started back, I lost my balance and went down. I thought the hatch covers were still on."

Were you asked that question and did you give that answer?

A Yes, sir.

Q And were you asked this question:

"Q At the time you lost your balance and went down, were you walking backwards?"

And did you give this answer:

"A I was semi, half and half. I was trying to feel my way along the wall. I was standing up backwards towards the hatch that was open."

Do you remember being asked that question and giving that answer?

A Yes, sir.

Q And were you asked this question:

"Q In which direction were you moving, side, forward, or backward?"

And did you give this answer:

"A I was moving in a side direction with my back towards the open hatch, my face towards the wall, or like

this.

"Mr. Klonsky: Indicating sideward motion."

Were you asked that question and did you give that answer?

A Yes, I did.

Q Were you asked this question:

"Q Are you indicating that you are moving along the wall or bulkhead of the hatch? Is that what you mean, or the reefer box?"

And did you give this answer:

"A Well, the reefer box is this way. The hatch is open" --

MR. KLONSKY: Excuse me, Mr. Kain. I think the word "box" does not appear there.

MR. KAIN: I'm sorry.

Q "Well, the reefer is this way. The ladder is over here. I knew I put my gloves and hook right by the ladder. I got in this way. I saw the reefer. I shined my light on it. My back was turned to the open hatch.

"Mr. Klonsky: What is that?

"The Witness: The hatch. The whole thing was open where you could step on it.

"Q Could you see --

"Mr. Klonsky: Into the square of the hatch?

"The Witness: Yes.

"Q Could you see it was open, with the flashlight?

"A No.

"Q Your back was toward the open hatch; is that correct?

"A Yes."

I am skipping to page 43, line 21:

"Q Was your back toward the square of the hatch?

"A Yes.

"Q Were you moving along the side or the bulwark or the reefer box?

"A I just veered away from the reefer box going towards where the ladder was at. Then I stopped just to shine the light to see where the glove was at. I didn't see it.

"Q Did you see the ladder?

"A No. But I saw where the ladder comes. I didn't see actually the ladder because the reefer is like this and the ladder is over here in the front. There is a little space here."

Do you remember being asked those questions?

A Yes, I was.

Q And giving those answers?

Page 46, line 10, were you asked this question -- I'm

sorry. Line 11:

"Q And were you backing up shining your light down, is that correct, when you go into the hatch square?

"A Yes."

Q Were you asked that question and did you give that answer?

A Yes, sir.

Q Were you asked this question:

"Q Was there any light in No. 2 hatch at all in the upper 'tween deck?"

Did you give this answer:

"No."

A That's correct.

Q And were you asked this question:

"Q Would you characterize it as very dark?"

And did you give this answer:

"A Yes, because I thought it was open. I thought that there was going to be light there. When I got into the hatch, it was still dark."

Were you asked that question and did you give that answer?

A Yes. I thought the top deck was open.

THE COURT: In other words, when you said you thought the deck was open, you were referring

to the main deck?

THE WITNESS: Yes.

Q But you were asked those questions and you gave those answers; is that correct?

A Yes, sir.

Q Now, when you stepped back into this hatch, what happened then?

A Excuse me?

THE COURT: When you stepped back into the hatch, what happened then?

A I fell. I went back.

Q What do you next remember?

A Hitting -- I screamed.

Q What happened then?

A I hit the floor.

Q And then what happened?

A After a little while, some people came down to help me.

Q Did you talk to them?

A I talked to somebody there, yes.

Q You were taken off the ship, were you, shortly thereafter?

A Yes, sir.

Q How were you taken off?

A I was put in a -- like a basket made out of some kind of metal, and winches took me out of the hold of the ship.

Q Have you since gone back to work, since the day of your accident, in any capacity?

A No, sir.

Q When were you last hospitalized for the injuries which you got in this accident?

A That was in '67 when I had the accident.

Q When were you last treated for these injuries by a doctor other than Dr. Grawbard; do you remember?

A Last month, I went to the hospital. I had a strong pain. They treated me there.

Q Which hospital was that?

A That was the Holy Family Hospital.

Q In Brooklyn?

A Yes, sir.

Q How long were you at the hospital last month?

A Well, they gave me some medication. They helped me over there for about an hour.

THE COURT: I didn't catch that.

THE WITNESS: I had a strong pain in my stomach. I went back to the hospital where they operated on me.

THE COURT: You don't mean they operated

on you last month. You mean where they operated on you back in '67?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. KAIN:

Q Well, were you just treated there? You weren't admitted as a patient to the hospital?

A No. They just gave me medication.

THE COURT: Medicine?

THE WITNESS: Yes, medicine. They checked me over.

Q Well, when were you last treated by a doctor other than Dr. Grawbard after your accident, other than this recent visit you made to the Holy Family Hospital last month?

A Well, then again last month, I went to a medical center right next to my neighborhood. I had told them I had complaints about my head --

THE COURT: No. You were asked --

THE WITNESS: Last month.

THE COURT: Yes. To a medical center in your neighborhood?

THE WITNESS: Yes.

Q What Medical centers have you been treated at other than Holy Family Hospital -- incidentally, what is

the name of the medical center in your neighborhood?

A It is William Berg Medical Center.

Q William Berg Medical Center. Was that the only time you were treated at the William Berg Medical Center?

A No. I went to the Wyckoff Hospital in emergency, too.

Q When were you at the Wyckoff Hospital?

A Several months back.

Q Let me see if I get these straight. Since you were discharged from Holy Family, you went back last month for medication?

A Yes, sir.

Q Were you there more than once?

A I have been to the Holy Family several times for emergencies.

Q Just for treatment?

A Just for treatments, yes.

Q You haven't been admitted there?

A No, sir.

Q And you haven't come under treatment of a specific doctor. You were given drugs or medication; is that correct?

A I only go to Dr. Grawbard. He gives me medication.

Q That is my question. Are you going to any other doctor other than Dr. Grawbard for treatment?

A No, sir.

Q When was the last time that you went to a doctor other than Dr. Grawbard on a regular basis for treatment?

A A regular basis, no.

Q MOre than once?

THE COURT: He said: "No."

A No, sir. I haven't. Just on emergencies, I go to the nearest hospital.

Q No. My question was: When was the last time prior to today that you went to a doctor for a course of treatment, more than one occasion to this same doctor, other than Dr. Grawbard?

A No. I haven't been.

Q You haven't been since you left the hospital?

A Yes, sir. At first, I was with Dr. Massela for I don't remember how long.

Q And how long were you under treatment by Dr. Massela?

A I don't remember.

Q Did it go over into 1968 or did it end in 1967?

THE WITNESS: It probably went into about close to a year after the accident.

MR. KLONSKY: About a year?

THE WITNESS: Yes. Something like that.

Q Sometime after July of '68?

A I don't remember it exactly.

Q But sometime in that area, about a year?

A It could have been, yes.

Q And have you been under regular treatment by any doctor other than Dr. Grawbard since that date?

A No, sir.

MR. KAIN: May I have just a moment?

THE COURT: All right.

BY MR. KAIN:

Q You still drive a car, don't you, Mr. Rodriquez?

A Yes, I do.

Q And do you remember when you last applied for a renewal of your license?

A I don't remember.

MR. KAIN: May I mark that for identification?

THE CLERK: A document marked for Identification as Defendant Pedersen's Exhibit E.

(So marked.)

(Document is handed to counsel.)

MR. KLONSKY: I can't see the date on it. Can you tell me?

(Private discussion held between counsel.)

THE COURT: All right. You have examined it. Continue.

MR. KLONSKY: Well, Your Honor --

THE COURT: You have your right on cross-examination.

MR. KLONSKY: I object. Other than it hasn't been offered yet --

THE COURT: It hasn't been offered.

MR. KLONSKY: I am just inquiring as to a date on it.

BY MR. KAIN:

Q Will you look at that photostatic copy, Mr. Rodriquez, and tell me if it bears your signature?

(Document is handed to the witness.)

THE COURT: Does the original of that bear your signature?

THE WITNESS: Yes, sir.

THE COURT: The witness says: "Yes."

Q Is that a copy of the application which you filled out when you last applied for a driver's license?

A I guess so.

Q Do you have your driver's license with you?

A No, I don't.

THE COURT: What is the date of that application?

THE WITNESS: It says April 1st here.

THE COURT: What year?

THE WITNESS: I don't see the year.

THE COURT: Well, you remember. You were there.

THE WITNESS: I don't remember exactly.

THE COURT: Was it this year?

THE WITNESS: No. It wasn't this year.

THE COURT: Last year?

THE WITNESS: I don't remember exactly when I took it out.

THE COURT: Is that your current application?

THE WITNESS: I would have to check it with my license. I don't know what year this one was.

BY MR. KAIN:

Q When does it say it expires, Mr. Rodriquez?

A '71; 3/31/71.

Q So, that is your current driver's license?

A Yes, sir.

THE COURT: Well, they are good for three years; aren't they?

THE WITNESS: Yes, sir.

MR. KAIN: I believe so, Your Honor.

THE COURT: All right. So, you applied shortly before March 30, '68?

THE WITNESS: I would have to look at my license to make sure.

THE COURT: Did you apply as much as six months before it expires?

THE WITNESS: I don't remember.

THE COURT: Have your license here this afternoon.

THE WITNESS: If I can find it.

THE COURT: You had trouble finding it?

THE WITNESS: Yes, sir; I had.

THE COURT: All right.

BY MR. KAIN:

Q When you made out this application, you were asked certain questions, weren't you, Mr. Rodriquez, on the application?

A Yes, sir.

MR. KAIN: Incidentally, Your Honor,

on the basis of the witness' answers to my questions, I would like to offer it in evidence.

MR. KLONSKY: Well, if we can find the date when he made this up, I would not object to it.

THE COURT: Well, you don't object to its authenticity as a photostat?

MR. KLONSKY: No.

THE COURT: All right. Mark it.

THE CLERK: Defendant Pedersen's Exhibit E previously marked for Identification now marked in Evidence. So marked.

(So marked.)

(Exhibit is handed to the Court.)

THE COURT: Is the expiration date on it?

MR. KAIN: Yes, it is, Your Honor. It is typed.

THE COURT: I see. March 31, '71.

BY MR. KAIN:

Q Would you look at that exhibit, your application, and would you tell me weren't you asked certain questions with respect to your health on that application?

THE COURT: JUst answer the question.

A Yes.

Q Did you answer those questions?

A Yes, I did.

Q Can you read the questions on that?

THE COURT: No. You read them to the Jury unless you want him to read them to himself.

MR. KAIN: Maybe his eyesight is better than my mine, Your Honor.

THE COURT: All right. On that basis, we'll take a recess now for five minutes.

(The Jury leaves the jury box.)

(Recess taken.)

THE COURT: Mike, would you ask the Jury in, please?

THE CLERK: Yes, Your Honor.

(The Jury enteres the jury box.)

THE COURT: You may continue, Mr. Kain.

MR. KAIN: Your Honor, before I proceed, may I note on the record that counsel has stipulated --

MR. COHEN: Mr. Wolf isn't here.

MR. KAIN: Oh, I'm sorry.

THE COURT: All right. All counsel are

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here.

What is the stipulation?

MR. KAIN: We have stipulated, Your Honor, that this application for a driver's license, which is defendant's Exhibit E in Evidence, is dated April 1, 1968.

MR. KLONSKY: So stipulated, Your Honor.

THE COURT: All right.

BY MR. KAIN:

Q Mr. Rodriquez, will you look at this application, Defendant's Exhibit E in Evidence, and I direct your attention to the last page.

(Document is shown to the witness.)

MR. KLONSKY: The last page?

MR. KAIN: The last page of the application, the back of it.

Q Did you, in answer to the question how long or how many miles you had driven the previous 12 months -- that is, the 12-month period prior to April 1968 -- check the box 4- to 6,000 miles?

THE COURT: Let me see it.

A I don't -- all I remember is that there was a lady asking me questions then, and I don't know if she was the

one who checked them off or I was the one.

THE COURT: In other words, you applied at the Motor Vehicle headquarters?

THE WITNESS: That's right.

THE COURT: So, when she --

THE WITNESS: I don't remember.

THE COURT: If she checked it off or you checked it off, the figure was applied by you?

THE WITNESS: She probably asked me that.

THE COURT: She didn't make it up; did she?

THE WITNESS: No. She just asked the different ones, and I just took one.

THE COURT: It is not 4 to 6. It is 4,000 to 5,999 --

MR. KAIN: I am sorry, Your Honor.

THE COURT: (Continuing) -- miles.

BY MR. KAIN:

Q Will you look at the first page of that, the question, specifically questions 1 and 5. Are the questions having to do with your physical condition, and specifically 5, which asked if you had suffered a disability or of a

previously existing disability had worsened, did you answer all those questions in the negative?

A Yes, I did.

MR. KAIN: No further questions.

MR. KLONSKY: May I see this?

THE COURT: Yes.

Mr. Cohen.

BY MR. COHEN:

Q Mr. Rodriquez, when you went to work on the Sunny Prince on the morning of July 3, 1967, I believe you said you had a medical card.

A Yes, sir.

Q Do you have that card with you?

A No. I don't have any of my papers.

Q Now, when you first started to work that morning, you worked in the No. 2 hatch; is that right?

A Yes, sir.

Q And part of the work you had to do at that hatch that morning was to remove the hatchboards?

A That's correct.

Q You have already described to the Jury that those are wooden boards, and the dimensions are approximately what?

A Five feet long, something like that, and about three

feet across.

Q And about how thick are they?

A Maybe about three inches.

Q And does one man remove them or do two men work on a board together?

A Two men work on a board.

Q Do those boards have recessed rings or other things in which you can grab ahold of them?

A Yes. They have spaces on each side where you can put a hook through and pick them up.

Q And each of you would work on an opposite side of the board and pick it up with your hooks; is that it?

A Yes, sir.

Q And the boards at the No. 4 hatch were the same as the ones at the No. 2 hatch; is that right?

A Yes, sir.

Q And before noontime, you had gone to the No. 4 hatch and your gang had been opening up the No. 4 hatch boards?

A That's correct.

Q Did you use your hooks at that time to open up the No. 4 hatch boards, or your hands?

A No, I used my hands.

Q At that time, you normally would have used your

hook to open up the boards at the No. 4 hatch?

A Yes, sir.

Q Did you at that time, not having your hook, did you ask your boss or snapper to go back to the No. 2 hatch to get your hook?

A It was so close to 12 --

Q I asked you if you asked your boss or snapper at that time if you could go back to get the hook you say you left at No. 2?

A No, sir.

Q Now, the wood that these hatch boards are made out of is rough, splintery type wood; is that correct?

A Yes, sir.

Q And normally, you would wear your gloves if you were going to handle them; isn't that right?

A That's correct.

Q Is it your testimony that you had neither your hook or your gloves on and that you nonetheless removed the hatch boards?

A Yes, sir. There was metal there so you wouldn't harm your hands to pick it up.

Q If I recall your testimony, it was between 11:15 and noontime, approximately 45 minutes that you spent at the No. 4 hatch removing the hatch boards on the main deck

level?

A About.

Q All right. Did you see your snapper or hatch boss during that period of time?

A Yes, I did.

Q But you had no conversation about this allegedly missing hook and gloves; is that right?

A No.

Q Now, when you finished your work in the No. 2 hatch, were you done discharging all the cargo? Is that correct?

A That's correct.

Q And that was approximately 11 o'clock in the morning?

A About.

Q And you heard somebody say to come up?

A That's correct.

Q And it is your testimony, if I understand you, that you left your glove and hook in the No. 2 upper 'tween deck somewhere?

A That's correct.

Q And was there some reason why you left it there when you had finished all the work in that hatch?

A I thought it was lunchtime and I thought I was going

to come back to the same hatch. I always leave my gloves and hook if I'm going back to the same hatch after lunch.

Q It was your testimony that you had finished discharging all the cargo in that hatch; is that right?

A Yes, sir.

Q What other work would there have been for you in that hatch if you had finished discharging?

A Loading.

Q Did anybody tell you that?

A We usually discharge a hatch and load a hatch right up.

Q Is it your practice to leave your gloves and hook behind when you are finished discharging a hatch?

A Correct.

Q Do other men in your gang have the same practice?

A Most of us, we do.

Q Is it your testimony that there were a number of gloves and hooks left behind in the upper 'tween deck?

A I don't know what the men did. I know what I did.

Q Did you see anybody else of the men in your gang leave their gloves and hooks?

A I was the first one out, the first one to take my hooks and gloves off and the first one up the ladder.

Q Now, when you came up on the main deck at the No. 2 hatch, did you see the deckmen of your gang working?

A I saw two, yes.

Q And if it had been lunchtime, those men would have gone off the gangway; wouldn't they?

A But I didn't see them working.

Q Did you see them there at the main deck level?

A Yes, I saw them. As a matter of fact, I saw them when I was going off.

Q And they were still there?

A They were still there.

Q Did you ask them whether or not it was lunch-time?

A The deckmen leave their lunches in some kind of a -- the ship houses, where their machines are, and it keeps their lunch warm. They eat up on deck sometimes.

Q Did you see the deckmen eating lunch at 11 o'clock?

A I don't bother with them. I take off.

Q Did you see them break?

A Yes.

Q Did you ask them whether wt was lunchtime?

A I just took off.

Q Now, did you say something in answer to Mr.

Kain's question that as you were back there in the No. 2 hatch, you had put one foot on top of the combing?

A Yes, sir.

Q Which foot?

A All I know is I had one foot on the combing and went down.

Q What was the purpose of your stepping onto the combing?

A It was a little high. I think the combing was a little high.

Q HOw high off the deck?

A Maybe a few inches. I don't know.

Q When you were working earlier in the morning on the upper No. 2 'tween deck, there was some deck space between the reefer and the after part of the hatch where the combing was; is that right?

A That's correct.

Q When you put your gloves and hook down, as you say, did you put it on the deck or on the hatch boards that at that time were in place?

A On the deck.

Q On the deck between where and where?

A I don't know exactly. I know I just threw it, and it fell on the deck.

Q On the deck near the ladder, though?

A Somewheres around there.

Q Was the ladder connected to the deck or was the ladder on the inside of the combing?

A I don't remember where it was.

Q One more question.

As you were going from the No. 4 hatch back to the No. 2 hatch, you say you did meet with some of the ship's cleaners?

A I saw them on No. 4 hatch.

Q And that was before you went into the No. 2 hatch?

A That's correct.

Q Did you ask them if they had found your gloves and hook in the course of cleaning No. 2?

A I didn't talk with them.

MR. COHEN: No further questions.

THE COURT: Mr. Wolf?

MR. WOLF: No, sir.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. KLONSKY:

Q Mr. Rodriquez, this application for a driver's license states thereon: "Eye test required."

A Yes, sir.

Q Did you have any discussion with the person who made up this form?

A No.

Q But it says: "Eye test required;" is that right?

A Yes.

Q Now, these questions ask the following:

"One, have you had or been treated for epilepsy, a convulsive disorder, fainting, or dizzy spells, or any condition which caused unconsciousness?"

You answer: "No." Is that right?

A Yes, sir.

Q Have you been treated for a heart ailment?

A No, sir.

Q Have you had any mental illness for which you had been confined to a public or private hospital?

You answered no to that; is that correct?

A That's correct, sir.

Q Is it necessary for you to wear glasses or contact lenses while driving a motor vehicle?

Your answer was no to that?

A That's correct.

Q Have you sustained physical disability or has a previous disability become worse?

The answer is no to that; correct?

A That's correct.

Q Have you completely lost the use of a leg, arm, or foot?

Your answer is no?

A That's correct.

Q Have you lost the vision of one eye and/or has your hearing become impaired?

Your answer was no; right?

A That's right.

Q Now, Mr. Rodriquez, this card that you had with respecting to working on the pier, you call that a medical card?

A Yes, sir.

Q What is the basis of that or nature of that?

A That shows how much seniority you have, more than another fellow.

Q Why did they call it a medical card?

A That is one of the beginning cards when you start working. It is a medical card. There is less than that. There is a lower form of a card.

THE COURT: Well, a medical card doesn't mean you are sick; does it?

THE WITNESS: No. It means that physically,

you are capable of doing the work.

Q In other words, it doesn't say you are ill. It says you are well?

A That's correct, sir.

Q Now, Mr. Rodriquez, when you proceeded through this passageway to get to the No. 2 hatch, was there any sign or any advice or any warning given to you about not going in there?

A No, sir.

Q On other ships, not this one, had there been similar passageways to go underneath the hatch?

A Yes, sir.

Q And in fact, you didn't sustain your accident in this areaway; it was after it you got to the No. 2 hatch; isn't that true?

A That's correct, sir.

Q Are you -- have you tried to drive a hi-lo since this accident occurred?

A No, sir.

Q How does driving a hi-lo differ from driving an ordinary vehicle?

A In an ordinary vehicle, there's air in the tires. You use a finger or so. In a hi-lo, you have to use strength. The tires are made out of solid rubber.

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Q You have to lift weights on these forks?
A Yes, sir.
Q And you have to service your vehicle?
A Excuse me?
Q Did you have to get gas and things like that for your vehicle?
A Yes, sir.
Q Are there times when these hi-lo's are put into the holds of ships?
A Yes, sir.
Q And you work down there, too?
A Correct.
Q Now, with respect to the cargo at the No. 4 hatch which you came to at 1 o'clock, were they untanned hides; is that what you call them?
A Yes, sir.
Q Were these steer hides or bovine?
THE COURT: Hold it. Is there a problem?
MR. KAIN: Your Honor, I wish to object to Mr. Klonsky leading the witness. It seems to me at this point, Mr. Klonsky is testifying and the witness is giving yes or no answers.
THE COURT: Well, we have it in without

dispute that there were hides in this No. 4 hatch. They don't appear to have entered into any of the transaction.

BY MR. KLONSKY:

Q Now, the discharge of these hides, do you recall the odor that came from it?

A Well, it was strong, a strong, bad odor.

Q Was there any insect life there?

THE COURT: Any what?

A Mosquitoes.

MR. KLONSKY: Insect life.

THE COURT: Insect life?

MR. KLONSKY: On the hides.

THE COURT: What are we getting into?

Q Did they have to wait a while --

THE COURT: This is redirect. There is nothing on cross that involved this.

MR. KLONSKY: Your Honor, it relates to the need of the hook which was just questioned by Mr. Cohen.

THE COURT: All right. That should have come out on direct.

MR. COHEN: My question was on the hatch covers, not on the light.

THE COURT: Well, he is referring to the fact that the witness then wanted to get his hook.

BY MR. KLONSKY:

Q Did the nature of that cargo require gloves and hook?

A Surely.

THE COURT: You are saying that to handle these hides --

THE WITNESS: You need the hooks and gloves.

THE COURT: (Continuing) -- it required the hook and glove. Is that why you asked to get them?

THE WITNESS: Yes.

Q Now, Mr. Rodriquez, in answer to questions posed by Mr. Kain, you referred to the Wyckoff Hospital and other places; right, sir?

A That's correct.

Q Have you also gone back to the ILA Clinic since then?

A Yes, sir.

Q With respect to the Wyckoff Hospital, what were you there for?

A It was an emergency. I had this pain, strong pain in my stomach and it was like the pains I used to get in the beginning when I had the accident. So, I went back to the Wyckoff Hospital.

THE COURT: Do you say it was or it was not?

THE WITNESS: It was.

Q How many times did you go to Wyckoff Hospital?

A Several times. I don't remember.

Q In what year was that?

A This year and last year, too.

Q What about this clinic in your neighborhood; what did you go to it for?

A I still had the pain over my face.

Q Indicating the left cheek.

A And I wanted to see if there was another doctor who could examine it just to see what he could tell me about it.

Q When did you last have pain there?

A I have pains there practically -- normally every day, usually. The lights here give me pain.

MR. KLONSKY: I have nothing further.

THE COURT: Recross examination?

MR. COHEN: Yes. Just one or two.

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RECROSS EXAMINATION

BY MR. COHEN:

Q Mr. Klonsky asked you some questions just now about hi-lo's. You answered one of his questions that hi-lo's lift cargo; right?

A Yes, sir.

Q And they have actually two blades on the front of the hi-lo that go up and down with cargo on them; is that correct?

A That's correct.

Q And the man who operates the hi-lo uses machinery to cause those blades to come up and down; doesn't he?

A Yes, sir.

Q You don't get out yourself and lift it up and down?

A No, sir.

Q And hi-lo's travel around on piers at relatively slow rates of speed; do they not?

A Some.

Q About how fast do they go on the average?

A They have power steering --

Q How fast do they operate on the average?

A I wouldn't know.

Q Do you drive hi-lo's around 50 or 60 miles per hour?

A No.

Q You have been there. Give us an idea of how fast they operate?

THE COURT: Does it go as fast as 10 miles per hour?

THE WITNESS: Faster.

Q 20 miles per hour, about would you say?

A I wouldn't know.

MR. COHEN: No further questions.

THE COURT: Mr. Wolf?

MR. WOLF: None.

THE COURT: All right. Step down.

(Whereupon, the witness was excused.)

MR. KLONSKY: Your Honor, may I now offer in evidence the hospital bill -- may I just have a moment, sir -- for his stay at the Holy Family Hospital?

(Document is handed to defense counsel.)

MR. KAIN: Does it show a total anywhere on it?

MR. KLONSKY: Yes, it does.

THE COURT: Whisper. Don't engage in

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please.

MR. KLONSKY: Your Honor, the hospital record we have now in evidence is poorly photostated, and all mixed up.

THE COURT: Well, unmix it.

MR. KLONSKY: I have a better copy.

THE COURT: Well, agree with your adversaries on that. If you have any problems, you will bring it to the Court's attention.

(The jury entered the jury box.)

THE COURT: All right. The defense will proceed.

MR. KAIN: Mr. Rogeberg.

O L A F R O G E B E R G , having been called as a witness, is duly sworn by the Clerk of the Court and is examined and testifies as follows:

THE CLERK: What is your full name, sir?

THE WITNESS: I better write it down for you, (spelling) O-l-a-f- R-o-g-e-b-e-r-g.

THE COURT: Will you pronounce it for the jury?

THE WITNESS: Olaf Rogeberg.

THE CLERK: Where do you live?

THE WITNESS: In Norway.

THE COURT: Give an address.

MR. KLONSKY: Is it R-o-g-e-b-e-r-g?

THE CLERK: Yes.

THE COURT: Give an address in Norway.

THE WITNESS: Norway, Votteroy.

THE COURT: What is that, the name of the town?

THE WITNESS: That is an island.

THE COURT: That is an island?

THE WITNESS: That is an island, yes.

DIRECT EXAMINATION

BY MR. KAIN:

Q Mr. Rogeberg, will you keep your voice up? Speak slowly. If there is anything I say that you don't understand, would you ask me to repeat it?

By whom are you presently employed, Mr. Rogeberg?

A I am employed by Olaf Pedersen Rederi. That is the office --

MR. KLONSKY: That is this --

MR. KAIN: Would you let me?

MR. KLONSKY: Your Honor, may I rise and ask if it is this defendant?

THE COURT: Yes. That is this defendant. Olaf Pedersen Roderi.

BY MR. KAIN:

Q What job do you personally have, Mr. Rogeberg, with Olaf Pedersen Rederi?

A I am the captain on the SUNNY GIRL.

THE COURT: What is it? SUNNY GIRL?

THE WITNESS: Yes.

THE COURT: That is not the same as the SUNNY PRINCE?

THE WITNESS: No, it isn't.

THE COURT: It is a different ship.

BY MR. KAIN:

Q How long have you been going to sea, Mr. Rogeberg?

A Since 1953.

Q And how long have you held a license of any kind?

A I got my mate's license in 1959.

Q How long have you held a master's license?

A Since 1964.

Q And by whom is that master's license issued, the one that you hold?

A It is issued by the Norwegian Maritime Government or authorities.

Q Is it an unlimited license? By that I mean, is it any tonnage, any ocean, anywhere in the world?

A Yes. I can sail anywhere.

Q Have you previously been employed aboard the SUNNY PRINCE?

A Not since I paid off in 1967.

Q When did you first go to work on board the SUNNY PRINCE?

A It was in December, 1964.

Q And when you first joined the SUNNY PRINCE, what did you join it as?

A I joined it as a first mate.

Q Did there subsequently come a time when you held a higher position aboard the ship?

A I paid off that first time as a first mate, and after five months, I came back as a first mate again. After four months, I became chief mate.

Q Can you tell us approximately when you became the chief mate of the SUNNY PRINCE?

A In April, 1966,

Q And how long did you remain aboard the SUNNY PRINCE as chief mate after April, 1966?

A Until July, 1967.

Q Captain, I show you this book and ask you if you'd care to tell me what it is?

(Book handed to the witness.)

11 A That is a log book of the SUNNY GIRL, covering the period March 3, 1967.

Q Is it the SUNNY GIRL?

A No, the SUNNY PRINCE. I'm sorry. The SUNNY PRINCE.

Q From what dates -- when does it start?

A On the 8th of March, 1967.

Q And when does it end? What is the last date in the log book?

A The 5th of -- the 5th of September, 1967.

Q Is that the vessel's rough log or the vessel's smooth log?

A That is the vessel's rough log.

Q Rough deck log?

A Yes.

Q Could you tell me who makes the entries in the vessel's rough deck log?

A That is the officer on watch.

Q A particular officer who is on watch at the time?

A Yes.

Q Is that a log book and entry which the ship is required to keep in the regular course of its business?

A Yes, it is.

MR. KAIN: I offer it in evidence, your

Honor.

THE COURT: Show it to your adversary.

What language is it in, Captain?

MR. KAIN: It is in Norwegian.

THE WITNESS: Norwegian, yes.

MR. KLONSKY: I can't read this book to know what it says, to know whether there is anything objectionable in it.

THE COURT: Is it only as to the translation or in any other regard?

MR. KLONSKY: That's all. I know what it is. As far as what it says, if it is contradictory to what they have previously given, I would object to it. The translation of the log in English --

THE COURT: In other words, you have a translation of the relative part of the log?

MR. KLONSKY: That's right, your Honor.

THE COURT: A purported translation that you received from the defendant shipowner?

MR. KLONSKY: Yes, sir.

THE COURT: Mark it subject to the accuracy of the translation.

THE CLERK: This will be marked.

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THE COURT: It is a deck log.

THE CLERK: Deck log is Defendant Pedersen's Exhibit F in evidence on conditions indicated by the Court. So marked.

(So marked.)

(Log book is handed to the Court.)

THE COURT: Okay. I am returning the exhibit to the witness.

(Exhibit is handed to the witness.)

BY MR. KAIN:

Q Captain, will you look at that log book and tell me if you can, when prior to July 3, 1967, the SUNNY PRINCE called at the Port of New York?

THE COURT: Most recently before July 3rd?

Q When it came in on that occasion, on the occasion it was in for July 3rd.

A At July 4th, you ask?

Q No. I say prior to July 3, 1967, when did the SUNNY PRINCE arrive in New York?

THE COURT: Before that date.

A The SUNNY PRINCE arrived in New York on July 1st, Saturday.

THE COURT: '67?

THE WITNESS: 1967.

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THE COURT: Saturday.

Q What time of day did the SUNNY PRINCE arrive in New York?

A It arrived at 12:45.

Q Did she at that time --

THE COURT: Is that right after noon?

THE WITNESS: Just after noon, yes.

THE COURT: 12:45 p.m.

BY MR. KAIN:

Q Did she go alongside a pier at that time?

A Yes, alongside Pier Number 3.

Q I'm sorry?

A Alongside Pier Number 3.

Q In Brooklyn?

A It was in Brooklyn, yes.

Q And what side of the ship was moored to the pier?

A The port side.

Q Did -- I withdraw the question.

Was there any working of cargo on July 1, 1967, aboard the SUNNY PRINCE?

A No.

Q How about on July 2nd, Captain? Was there any cargo work on Sunday, July 2, 1967?

A No.

Q Will you look at the entries for July 3, 1967, Captain, and tell me whether cargo was worked on that day?

A Yes, it was.

Q Does your log book indicate how many gangs of longshoremen came aboard the ship on that date?

A It says three gangs.

Q What time of day did they come on board, Captain?

A At 8:15.

THE COURT: 8:15 a.m., in the mo·ning?

THE WITNESS: Yes.

Q Does the log book indicate where these longshoremen worked?

A It says -- what it says is, they started rigging and discharging their cargo --

THE COURT: They started -- they -- they started lading?

THE WITNESS: Rigging, rigging.

THE COURT: Rigging?

THE WITNESS: Rigging the hatches and discharging the cargo.

Q Does it mention any specific hatches?

A No.

Q Does that log book indicate whether any ship cleaners worked on board the ship that date?

A It says, at 8 o'clock, cleaners on board started cleaning the hatches.

Q The hatches?

A Yes, sir.

THE COURT: That is 8 a.m., 8 in the morning?

THE WITNESS: Eight in the morning.

THE COURT: Not eight at night.

THE WITNESS: No.

BY MR. KAIN:

Q Captain, I show you this document and ask you if you can't tell me what it is?

(Document is handed to the Court.)

THE COURT: Is it in evidence?

MR. KAIN: No, your Honor.

May we mark it for identification?

THE COURT: Yes, you'd better, and show it to your cocounsel and adversary.

THE CLERK: Marked for identification as Defendant Pedersen's Exhibit G. So marked.

(So marked.)

(Documents handed to Mr. Klonsky.)

MR. KLONSKY: Is this the cargo plan of this voyage, Mr. Kain?

MR. KAIN: Yes.

MR. KLONSKY: I have no objection.

BY MR. KAIN:

Q Would you look at that document, Captain, and tell me what it is?

A It is a cargo plan.

THE COURT: Of the SUNNY PRINCE?

THE WITNESS: Of the SUNNY PRINCE.

THE COURT: What is a cargo plan?

THE WITNESS: It is a plan showing the cargo on a particular voyage.

THE COURT: What voyage is this?

THE WITNESS: This is Voyage Number 13 North.

Q Does that plan cover the cargo discharged from the SUNNY PRINCE at Brooklyn, New York?

A Yes, it does.

Q On July 3, 1967?

A Yes, it does.

Q Could you tell me who drew that cargo plan?

A I did.

MR. KAIN: I offer it in evidence, your

Honor.

MR. KLONSKY: No objection.

THE COURT: No objection. Mark it.

THE CLERK: Defendant Pedersen's Exhibit G, previously marked for identification, now marked in evidence. So marked.

(So marked.)

(Exhibit is handed to the Court and subsequently handed to the witness.)

BY MR. KAIN: MR. KAI

Q Now, Captain, when this ship came to New York on July 1, 1967, was the vessel at that time under charter?

A Yes.

Q And while she was in New York, did she go off of the charter that she was operating under at the time when she arrived?

A She went off the charter after all the cleaning had been finished on the 3rd of July.

Q What time did she go off the charter? Is that indicated in your log book there?

A At nineteen hundred.

Q And is that 7 p.m.?

A Yes.

THE COURT: 7 p.m.?

THE WITNESS: Yes.

THE COURT: July 3rd?

THE WITNESS: Yes.

BY MR. KAIN:

Q At 7 p.m. on July 3rd, when this ship went off charter, had all cargo been discharged from the ship?

A Yes.

Q Had all the hatches on the ship been cleaned?

A Yes.

(Continued on next page.)

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Q Were any of these hatches cleaned by ship's crew?

A No.

MR. KLONSKY: Your Honor, I object to this question. I don't think it is material to this liability as to whether it was a ship's crew or not.

It may develop that it is not material at all. I can't tell at this stage.

BY MR. KAIN:

Q What will -- incidentally -- I withdraw that question.

How many hatches did this ship have?

A Six.

Q And did you know if all of these hatches were cleaned while the ship as at Pier 3, in Brooklyn, New York on July 3?

A Yes.

THE COURT: In other words, the cleaning took place while the ship was at Pier 3 and all the cleaning was done on July 3?

THE WITNESS: That's correct.

THE COURT: All right.

Q Now, referring, Captain, to your cargo stowage plan which is Defendant's Exhibit G in evidence,

would you tell me what cargo -- let me withdraw that question for a moment.

Was all of the ship's cargo discharged on the 3rd of July in New York?

A Yes, sir.

THE COURT: What does the discharging of cargo in that sense mean?

THE WITNESS: Discharging, sending the cargo ashore.

THE COURT: Cargo had been taken out of the ship?

THE WITNESS: Yes, and ashore.

THE COURT: And placed where?

THE WITNESS: Ashore.

THE COURT: On the adjacent dock?

THE WITNESS: Yes.

THE COURT: Using --

THE WITNESS: Our own gear, the beams, the ship's gear.

Q And this was all done on the 3rd of July. There was no cargo work on July 1 or 2; is that correct?

A No. Everything on July 3.

Q Will you tell me, referring to Defendant's Exhibit G in evidence, the cargo stowage plan, what

cargo was discharged from number one hatch?

THE COURT: That is number one hatch?

MR. KAIN: Yes.

THE COURT: Well, suppose we ask him first of all with respect to the ship, where was number one hatch?

THE WITNESS: Number one hatch is the first hatch.

THE COURT: Nearest the front of the ship, nearest the bow?

THE WITNESS: Yes.

THE COURT: Go ahead.

A And from that hatch, it discharged 1800 bags of coffee, 1300 bags of beans. This was actually Montreal cargo to be discharged in New York.

THE COURT: Cargo from Montreal?

THE WITNESS: No. The cargo was to go to Montreal.

THE COURT: The cargo was to go to Montreal?

THE WITNESS: Yes.

BY MR. KAIN:

Q Again referring to the cargo stowage plan, Defendant's Exhibit G in evidence, what cargo was discharged on July 3, from hatch number two of the Sunny Prince?

A From hatch number two, it was discharged 700 boxes of frozen shrimps. That was 7 and 1/2 tons.

Q How many tons?

A 17 tons.

THE COURT: 17 or 7?

THE WITNESS: 17 and 1/2 tons.

THE COURT: 17 and 1/2 tons.

Q Were the 17 and 1/2 tons of frozen shrimp the only cargo in number two hatch to be discharged out of New York?

A Yes.

Q Was the 17 and 1/2 tons of frozen shrimp the only cargo in number two hatch when the Sunny Prince arrived at New York?

A Yes.

Q Was there any cargo from number three hatch discharged at New York on July 3, 1967?

A No.

Q Was there any cargo from number four hatch discharged at New York on July 3, 1967?

A Yes.

Q What cargo was discharged from number four hatch on that date?

A It was 363 bundles of hides, 45.9 tons.

MR. KLONSKY: 45.9 tons.

BY MR. KAIN:

Q Was there any other cargo to be discharged from number four hatch?

A No.

Q Other than the hides, that you have just mentioned?

A No.

Q Incidentally, Captain, could you tell me where the frozen shrimp which was to be discharged or which was discharged in New York on July 3 from the number two hatch was stowed?

A It was stowed in the upper 'tween deck, aft part, in a locker.

THE COURT: The after part?

THE WITNESS: Yes.

THE COURT: That is the rear part of hatch number two.

MR. KLONSKY: Did he say in a locker?

THE WITNESS: In a locker.

BY MR. KAIN:

Q Was this locker you referred to refrigerated?

A Yes.

Q Is that also sometimes called a reefer or

reefer box?

A Yes.

Q Could you tell me where the hides you referred to as being discharged from number four hatch were stowed when the Sunny Prince arrived in New York?

A They were stowed in hatch number four, lower hold in the after part.

THE COURT: In which area? The after part?

THE WITNESS: The after part.

THE COURT: The rear part of hatch number four?

THE WITNESS: Yes.

Q Was there any cargo discharged from the Sunny Prince from number five hatch on July 3, 1967?

A Yes.

Q What cargo was discharged from number five hatch on that date?

A It was 100 bundles of cotton, 26.6 tons.

MR. KLONSKY: Bundles of cotton.

THE WITNESS: Cotton.

THE COURT: Cotton.

A (continuing) 500 bags of coffee. That was 35 tons. And 159 crates of general cargo, 15 tons.

Q Was that the only cargo discharged from

number five hatch on that date?

A Yes.

Q Now, how about number six hatch? Was there any cargo discharged from number six hatch on July 3, 1967?

A Yes. It was, again, some cargo going to Montreal.

Q What cargo was that?

A That was 1000 bags of coffee, 17.5 tons and some -- 7 big tires, airplane tires.

THE COURT: How many tires?

THE WITNESS: Seven.

MR. KLONSKY: Seven?

THE WITNESS: Yes.

THE COURT: Airplane tires.

THE WITNESS: 3.3 tons.

Q Is that all that was discharged from number six hatch on that date?

A Yes, sir.

Q Does your log book indicate when the entire discharge of the ship was complete?

A Discharging was finished at 1740, 540.

THE COURT: That is 20 to 6 in the evening?

THE WITNESS: Yes.

THE COURT: Of July 3?

THE WITNESS: Yes, 1967.

Q Now, you told us before, did you not, Captain, that you left the ship on that date?

A Yes.

Q And for what purpose did you leave it?

A For having my holidays, my vacation.

Q You left the ship to go back to Norway, did you?

A Yes.

Q Do you recall at what time you left this ship?

A Oh, 3 o'clock, 3:30 in the afternoon.

Q Could you tell me, Captain, referring to your log book or your cargo stowage plan as necessary, where the cargo of frozen shrimp stowed in the reefer box in the after 'tween deck of number two hatch was loaded?

A Where was loaded?

Q Where.

A It was loaded into Marco, Columbia.

THE COURT: It was put aboard there?

THE WITNESS: Yes.

THE COURT: Is that your question?

MR. KAIN: That is my question, yes.

Q And this cargo --

THE COURT: That is in South America?

THE WITNESS: South America.

Q And this cargo was kept under refrigeration, was it, until your arrival in Brooklyn?

A Yes.

Q Does your log book indicate what time of day the discharge of the frozen shrimp from number two hatch commenced?

A It commenced at 0915. That is 9:15 in the morning.

Q And does your log book indicate at what time the discharge of this frozen shrimp was completed?

A At 10:50.

THE COURT: In the morning?

THE WITNESS: Yes.

Q Could you tell me who did the discharge of the cargo from the Sunny Prince on July 3, 1967, during the period of time you were aboard here, that is, from approximately 8:15 until approximately 3 o'clock to 3:30 when you say you left the ship?

MR. KLONSKY: I inquire as to whether Mr. Kain said 8:15. I understand it started at 9:15.

THE COURT: No. He is asking about during the period this man was aboard ship.

Let's get it straight first. You say the

discharge of the shrimp started at 9:15 a.m. and it finished at 10:50 a.m.?

THE WITNESS: Yes, sir.

THE COURT: That is a period of one hour and 35 minutes?

THE WITNESS: Yes.

THE COURT: All right. Now you are being asked the --

MR. KAIN: May I have the question read back?

(Whereupon the record was read by the reporter.)

A It was longshoremen from New York. That's all.

THE COURT: Longshoremen from whom?

THE WITNESS: From New York.

Q Did your ship's officers or crew at any time that day discharge or assist in the discharge of cargo?

A No.

Q Did your ship's officers or crew at any time that day clean or assist in the cleaning of the vessel's hatches?

A No.

MR. KLONSKY: Your Honor, I move to strike this testimony as to what others did because with

respect to the case of the plaintiff against this defendant, it would be immaterial to issues of liability.

THE COURT: This is a circumstance. However, the word "assist" might require a closer definition.

Did your crew or your officers in any fashion participate in the discharge of the shrimp from the boat?

THE WITNESS: No.

BY MR. KAIN:

Q Did your crew or officers in any way participate in the cleaning of the ship's hatches on that date?

A No.

Q Captain, I show you a blueprint of a plan of the Sunny Prince which is Plaintiff's Exhibit --

THE COURT: Is that 7 or 3?

Q (continuing) 3 in evidence and I direct your attention specifically, Captain, at this time, to that portion of the print which shows the vessels number four lower hold.

Could you tell me, Captain, are there any or is there any ladder or are there any ladders leading from the number four lower hold to the number four 'tween

deck?

A It doesn't show here on this drawing but there is one ladder in number four lower hold, after end, after compartment.

THE COURT: As you look at the drawing, no ladder appears.

THE WITNESS: No.

THE COURT: But from your memory, your recollection is -- where is the ladder?

THE WITNESS: In the after part, port side.

THE COURT: Port side is the left side facing forward?

THE WITNESS: Yes, sir.

THE COURT: Of the number four lower hold?

THE WITNESS: That's right.

THE COURT: And the ladder leads from the first floor above to the 'tween deck?

THE WITNESS: That's right.

BY MR. KAIN:

Q And the port side of the ship was the side next to the pier on this particular date?

A Yes, sir.

Q Now, Captain, is there any ladder leading

from the lower hold, the number four lower hold, to the number four 'tween deck located in the forward part of number four?

A No.

THE COURT: In other words, the drawing itself doesn't show it.

THE WITNESS: It doesn't show it, no.

THE COURT: And your recollection is there was no ladder.

THE WITNESS: No ladder.

THE COURT: In the forward part of that hold.

THE WITNESS: Yes.

BY MR. KAIN:

Q Were there one or more ladders leading from the number four 'tween deck to the main deck at number four hatch, the uppermost deck?

A It was two ladders.

Q Where were these ladders located?

A One in the after end and one in the forward end, both of them in the center.

THE COURT: So, what you are saying then, is that if you consider the ladder that you remember was in the back of the lower hold on

the port side, the left side, leading to the 'tween deck --

THE WITNESS: Yes.

THE COURT: You reached that part, you would have to walk over some distance to the center of the hold.

THE WITNESS: Yes.

THE COURT: In order to get to the other ladder in the back of number four hatch which led up to the main deck.

THE WITNESS: Yes.

THE COURT: To the deck on top of the ship.

MR. KLONSKY: Your Honor, I think I missed where he said those two ladders were located.

THE COURT: Which two?

MR. KLONSKY: The two ladders from the 'tween deck up to the main deck.

THE COURT: He says they were located one in the back and one in the front, but in the center of the hatch; is that correct?

THE WITNESS: Yes, sir.

BY MR. KAIN:

Q Now, Captain, will you look at that plan in

front of you, Plaintiff's Exhibit 3 in evidence and tell me immediately forward of the number four hatch on the shelter deck level --

THE COURT: Shelter would be the main deck, is that what you're talking about?

MR. KLONSKY: No, that is the 'tween deck, your Honor. In number four, there is one 'tween deck --

MR. KAIN: I'll rephrase it, your Honor. I am referring to the same level as we have been referring to as the 'tween deck.

Q On the level immediately below the main deck, just forward of number four hatch, is there cargo space on either side?

A Yes.

Q Would you tell me between this cargo space on either side, what is located?

A There is a motor casing.

THE COURT: A what?

THE WITNESS: A motor casing.

THE COURT: A motor casing?

THE WITNESS: Yes.

THE COURT: What does casing mean?

THE WITNESS: WEll, that is a part going

up from the motor room.

THE COURT: It covers something?

THE WITNESS: It is covering the upper part of the motor room, yes.

BY MR. KAIN:

Q Is that the casing or walls, the container around the engines room, the motor room?

A Yes, sir.

Q The Sunny Prince was a motor ship; was she?

A Yes, sir.

Q She had diesel engines?

A Yes, sir.

Q Would you tell me, Captain, on July 3, 1967 -- I'll withdraw that question for the moment.

How far -- you can refer to that print if you wish to -- how far did these spaces on either side of the motor casing extend forward from number four hatch?

A 47 and 1/2.

MR. KLONSKY: I didn't hear that.

THE COURT: 47 and 1/2 feet.

Now, what extends down that space on either side of the casing?

THE WITNESS: Yes.

THE COURT: What is that 47 and 1/2 feet?

THE WITNESS: That is the length of it.

THE COURT: Length of what?

THE WITNESS: Of these cargo spaces (indicating).

BY MR. KAIN:

Q Are you indicating, Captain, that from where you enter this space from the forward end of number four hatch to where you leave this space at the after end of number three, is a distance of 47 and 1/2 feet?

A Yes.

Q On the port side of those spaces on July 3, 1967, the space on the port side, what if anything was stowed in that space?

A Yes. It was filled up with ship's gear.

Q What kind of ship's gear? Could you describe some of it for me?

A Mostly pipes, pipes about that size (indicating).

THE COURT: Indicating about an inch and one quarter?

THE WITNESS: Yes. They had been taken up from the deep tanks. They had been used as heating coils.

Q Was there any type of a fence or bulkhead between number four hatch and this space on the port side?

A Yes.

Q Could you tell me what type of bulkhead or fence?

A Well, it was a fence consisting of steel bars about that thick (indicating).

THE COURT: About an inch thick?

THE WITNESS: Yes. And about -- (indicating) --

THE COURT: And about three inches wide?

THE WITNESS: Yes.

Q Were they flat pieces of steel?

A No, round.

Q Round pieces?

A Yes.

Q And did they form like a space or was there a space between them?

A Yes.

Q Did they run from the deck to the overhead?

A Yes.

Q Was there a door in this space?

A Yes.

MR. KLONSKY: Your Honor, may I rise to object to the relevancy of the port side because our accident happened on the off shore side.

MR. KAIN: I submit, your Honor --

THE COURT: Well, the port side was the side nearest the pier; was it not?

THE WITNESS: Yes.

THE COURT: Well, anything that deals with the interior of the ship in this general area is relevant, and the materiality of it is something which counsel, after all the evidence is in, can argue to the jury.

It may be that what he is going to say is that this is the only door that was opened or available for anybody to enter and therefore the plaintiff proceeded on the port side, although he said he proceeded on the starboard side.

I don't say that anything like that will be his testimony but I am merely citing that as a possibility bearing upon your objection that it was not relevant.

Go ahead.

BY MR. KAIN:

Q Now, Captain, on July 3rd --

THE COURT: Before you leave that, let's get our terms clearly defined.

What do you say there was in this grill

of bars that was this boundary between the forward part of hatch four and the after part of hatch three. You said there was a door.

THE WITNESS: A door, yes.

THE COURT: What do you mean by a door?

THE WITNESS: Like the door there (indicating).

THE COURT: In other words, there was the space for a door?

THE WITNESS: Oh, yes.

THE COURT: And the door there besides?

THE WITNESS: There was a door, yes.

THE COURT: A door with hinges?

THE WITNESS: Yes, but made from these small -- these steel bars, these steel pipes.

THE COURT: In other words, the door was also made of these pipes --

THE WITNESS: Yes.

THE COURT: (continuing) vertical steel pipes?

THE WITNESS: Yes.

THE COURT: With spaces in between?

THE WITNESS: Yes.

THE COURT: But it was physically a

door which could swing on hinges?

THE WITNESS: Yes.

THE COURT: All right. The witness says yes.

Go ahead. You may continue.

BY MR. KAIN:

Q Was there a combing or a threshold or a ledge across this door on the port side --

A Yes.

Q (continuing) of the doorway. Could you tell me in which the direction the door opened? Could you push it forward to open it or did you move it back toward number four hatch to open it?

A You pulled it back to number four hatch.

(continued on the next page.)

THE COURT: In other words, if you are going from Number 4 hatch to the Number 3 hatch, you couldn't push the door forward; you'd have to pull it toward you, toward the Number 4 hatch?

THE WITNESS: Yes. The doors in the after end, yes.

THE COURT: Now, you said "doors." There is a double door or a single door?

THE WITNESS: Yes, a double door.

THE COURT: A double door with hinges on both sides?

THE WITNESS: Yes.

BY MR. KAIN:

Q Was the situation on the starboard side with respect to this pipe barricade or fence the same as on the port side?

A Yes.

Q You had the same steel bars?

A Yes.

Q Did you have the same type of door set into these -- would the one on the starboard side and one on the port side, were they double doors that you opened out?

A Yes.

THE COURT: And the double doors on the

port side also pulled in toward Hatch Number 4?

THE WITNESS: Yes.

Q Did it also have on the starboard side -- was there also a combing or a ledge or threshold across the doorway?

A Yes.

Q And on July 3, 1967, on the starboard side, what was -- what if anything was stowed in this particular space?

A No, it was not very much. It was a few pieces of dunnage, probably.

Q Was there any ships' stores other than these pieces of dunnage in there?

A No.

Q On July 3, 1967, was there any fixed lighting in these two spaces; that is, the spaces on the port and starboard sides?

A No.

THE COURT: What does that mean? What does "fixed lighting" mean?

THE WITNESS: Well, there was no fixed lighting.

THE COURT: You had to bring your own light?

THE WITNESS: Yes.

THE COURT: In other words, you couldn't

throw a switch? You couldn't pull a chain?

THE WITNESS: No.

THE COURT: You couldn't take a match and light something?

THE WITNESS: No.

THE COURT: There was no light set into the walls or ceiling or floor there?

THE WITNESS: No.

THE COURT: All right.

BY MR. KAIN:

Q Now, with respect to these two compartments, these two areas on the port and starboard sides, when you entered these compartments at Number 4 hatch, if you proceeded forward or if you walked forward, did there come a point in these compartments, in other words, where there was door of some kind at the other end?

A Yes. It was just the same in the other end as it was in the after end.

Q Were they the same type of doors in the other end?

A Yes.

Q In what direction did those doors open? Did they open forward, or did they open aft?

A Those you had to push open, so they would open forward.

Q They would open forward?

A Yes.

THE COURT: But the construction was the same, vertical steel bars, some space between, the doors similarly constructed?

THE WITNESS: Yes, sir.

THE COURT: With a threshold, a combing at the bottom?

THE WITNESS: Yes, sir.

THE COURT: About how high would that combing be?

THE WITNESS: About that much (indicating).

THE COURT: Indicating about an inch and three quarters. That is vertical, off the ground?

THE WITNESS: Yes.

BY MR. KAIN:

Q Captain, do you know what sweat patons are?

A Yes.

Q Would you tell his Honor and the ladies and gentlemen of the jury what a sweat paton is?

A It is pieces of wood hung vertical on the ship's side, on the inside of the ship's side, to prevent damaging cargo from sweating because of the difference of the temperature of the water and the temperature of the hatch.

Q Are they fitted along the side of the ship horizontally with the ship?

A Yes.

Q You said "vertically." Is it horizontal?

A Horizontal, yes.

THE COURT: He said vertical, but his hand showed horizontal.

THE WITNESS: It is horizontal, yes.

Q Were these spaces that you have referred to on either side of the motor casing, fitted with sweat patons on July 3, 1967?

A Yes.

Q Were these spaces used for the carriage of cargo as well as for ship's stores?

A They were used for cargo.

Q And also for some ship's stores?

A Yes.

THE COURT: What are ship's stores?

THE WITNESS: Well, in this case, it was the pipes we had on the other side. It could be a number of other things, engine parts.

THE COURT: That the ship itself used?

THE WITNESS: Yes.

THE COURT: It wasn't being delivered to

customers or consignees?

THE WITNESS: No.

Q Could you tell me how wide this compartment was on the starboard side, Captain, referring to the plan, if you would, please?

A About twelve feet.

Q And about how high was it?

A About ten feet.

Q Were there any --

THE COURT: Now, let me get this straight: This area which you have just given is the width and the height of the passageway beyond the door that you have described.

THE WITNESS: Yes, sir.

THE COURT: Is that correct?

THE WITNESS: Yes.

THE COURT: Running the whole length --

THE WITNESS: Yes.

THE COURT: -- that is, from the door that you have to pull in at Hatch 4 to the door you push out at Hatch 3?

THE WITNESS: Yes.

THE COURT: Or wherever it is.

MR. KLONSKY: That we don't know.

THE COURT: I withdraw the reference to Hatch 3, but in the direction of Hatch 3, Hatch 2 and Hatch 1.

THE WITNESS: Yes.

Q Were there any ventilation pipes running from the overhead to the deck in that passageway, Captain?

MR. KLONSKY: Which one, your Honor?

Q The starboard passageway, forward of Number 4?

A No.

THE COURT: By "deck," you mean floor?

MR. KAIN: That's correct.

THE COURT: You don't mean the deck of the ship; there were no pipes there?

THE WITNESS: No.

Q Now, forward of the forward set of doors, Captain, what is located on that ship?

A That is Number 3 hatch.

Q And is there a hatch square -- I'll withdraw the question.

On July 3, 1967, was there a hatch square at Number 3 hatch?

A Yes.

Q In the shelter deck or the upper tween deck?

A Yes.

Q Could you tell me, referring to the plan, Plaintiff's Exhibit 3 if necessary, what the dimension of the hatch square on the shelter deck or the upper 'tween deck was?

A Actually, there are three hatch openings. It is two deep tanks in the after end, and the hatch for the dry cargo in the forward end.

Q Well, could you tell me --

THE COURT: Just a second. Read back a couple of questions and answers.

(Whereupon, the record was read.)

A The hatch for the dry cargo is about twenty by eighteen feet.

Q When you say twenty, is that side to side, athwart-ship measurement?

A Yes, sir. Athward ship is twenty, and before and after is eighteen feet.

Q Yes.

A Then the two hatch openings to the deep tanks are each about -- also eighteen feet long. That is in a back-and-forward direction.

Q Forward and aft?

A And about eight feet wide.

THE COURT: That would be two of them?

THE WITNESS: The two of them, eight each.

THE COURT: Is there a little space between the two of them?

THE WITNESS: Yes.

Q And there is one on either side; is there, Captain?

A Yes.

Q Either side of the ship; a port deep tank and a starboard deep tank?

A Yes.

Q On July 3, 1967, what type of cover was used to cover the deep tank operation in the Number 3 upper 'tween deck?

A It was covered with big steel plates.

Q Steel plates?

A Yes.

Q Now, how about the hatch square, the Number 3 hatch square in the forward part of Number 3?

A It was covered like the other hatches by beams and hatch boards.

Q Now, Captain, will you look on the starboard side of the Number 3 upper 'tween deck or shelter deck, and tell me whether there were any ventilation pipes in that area?

A Yes.

Q Could you tell me approximately how many there were, Captain?

A It was six ventilators and two posts.

Q When you say posts, you mean king posts?

A Yes.

Q Could you tell his Honor and the ladies and gentlemen of the jury what you mean by a king post?

A A post that is a king post is kept to keep the booms which we are discharging cargo with.

Q It goes from --

A Over --

Q -- from the main deck, supports the booms and goes down into the ship?

A Yes.

Q And it is secured in the ship structure?

A Yes.

Q Was there a trimming hatch in Number 3 'tween deck on the offshore side?

A Yes.

Q And would you tell his Honor and the ladies and gentlemen of the jury what a trimming hatch is?

A It is small hatches about three by three feet, used to trim cargo like grain, and things like that.

MR. KAIN: Your Honor, at this time I have

* * *

THE COURT: I think we had on the stand a witness, the ship's captain.

O L A V R O G B E R G, recalled as a witness, having been previously sworn by the Clerk of the Court, resumed the stand, and testified further as follows:

THE COURT: You are still under oath.

DIRECT EXAMINATION

BY MR. KAIN (Cont'd):

Q Now, yesterday afternoon, Captain, it is my recollection that you told me the distance on the offshore side of the cargo space just forward of No. 4 hatch -- the door that you entered the cargo space, until the door where you left it, was approximately 47 feet; is that correct?

A Yes.

Q And where is the forward door located, Captain?

A In the aft end of the hatch No. 3.

Q Now, could you tell me what the distance from the aft end of hatch No. 3 to the forward end of hatch No. 3 is?

A It is also 47 feet.

THE COURT: In other words, from the

door in 4 to the door in the aft end of 3 is 47 feet, and then continuing to go forward?

THE WITNESS: Yes.

THE COURT: Until you reach the end of hatch No. 3, you proceed another 47 feet?

THE WITNESS: Yes, from the aft end of hatch No. 3 until the forward end of hatch No. 3, it is 47 feet.

MR. KOLONSKY: I am not sure where he starts with the No. 4 hatch to get the 47 feet.

THE COURT: The forward end of No. 4.

MR. KAIN: May I suggest that I prefer Mr. Kolonsky save his questions?

MR. KOLONSKY: I just wanted to know what he said.

THE COURT: It is apparent the witness was not talking loud enough.

The distance from the door at the forward end of hatch No. 4 to the forward end of hatch No. 3 is 47 feet?

THE WITNESS: That is two times 47 feet.

MR. KOLONSKY: I am sorry. I don't understand.

THE COURT: Suppose you state it in your

own language. From where to where is the first 47 feet?

THE WITNESS: The first 47 feet is from the forward end of hatch No. 4 to the aft end of No. 3. The next 47 feet is from the aft end of hatch No. 3 to the forward end of hatch No. 3.

BY MR. KAIN:

Q So my arithmetic is correct. We now have 94 feet from the forward end of hatch No. 4 to the forward end of hatch No. 3; is that correct?

A Yes.

Q Again, directing your attention to the offshore side and specifically the cargo space forward of hatch No. 3, what cargo space is forward of hatch No. 3?

THE COURT: That means forward is going forward and beyond the end of hatch No. 3. What cargo space is on the offshore side?

THE WITNESS: Of cargo space -- cargo space of 3,500 --

Q Does hatch No. 3 lead directly into hatch No. 2?

A Yes.

Q Do you find, Captain, on the offshore side

a bulkhead or wall containing a baggage compartment and a reefer box in No. 2 hatch?

A Yes.

Q Would you tell me -- referring to the plan which is Defendants' Exhibit G, I believe, in Evidence -- referring to that plan, would you tell me the distance from the forward end of hatch No. 3 to the forward end of the wall or bulkhead containing the reefer box?

A That is 48 feet -- 38.

Q Is a portion of that cargo space under the bridge housing?

A Yes.

Q And is that included in the -- did you say 38 feet or 48 feet?

A 38.

Q Is that included in the 38 feet that you referred to?

MR. KAIN: Let me rephrase the question.

Q Forward of No. 3 hatch you have a section of space under your bridge housing?

A Yes.

Q Is that correct?

Now, is the wall or bulkhead containing this reefer box located under the bridge housing or forward

of the bridge housing?

A It is under.

Q And the distance, if I recall your answer to my question just a minute ago, from the forward end of No. 3 to the forward end of that bulkhead is 38 feet?

A That is correct.

THE COURT: That includes the length of the side of the reefer box, the 38 feet?

THE WITNESS: The reefer box and some other rooms, yes.

THE COURT: It does include the whole length of the reefer box?

THE WITNESS: Yes.

Q Incidentally, Captain, on the main deck level -- the uppermost level on the SUNNY PRINCE, is there a latch opening to No. 1 hatch?

A Yes.

Q Is there also a hatch opening to No. 2 hatch?

A Yes.

Q On July 3, 1967, Captain, were there any fixed lights in No. 3 hatch of the SUNNY PRICE?

A No.

Q How about hatch No. 2 on July 3, 1967, were there any fixed lights in hatch No. 2?

A No.

Q Now, you told me, Captain, I believe just before you left the stand yesterday, that in No. 3 hatch on the offshore side, there was a trimming hatch.

A Yes.

Q How did you describe a trimming hatch? First of all, what is its purpose?

A It is to trim cargo such as grain and bulk.

THE COURT: Bulk cargo?

THE WITNESS: Yes.

THE COURT: What does trimming mean?

THE WITNESS: It means to get the cargo out.

THE COURT: Smooth, level?

THE WITNESS: Yes.

Q Are bulk cargoes loaded in through these trimming hatches to fill up the wings?

A Yes.

Q Could you tell me what size the trimming hatch was, or the approximate size of the trimming hatch on the offshore side of No. 3?

A About three by three feet.

MR. KOLONSKY: Three by three?

Q Three by three?

A Yes.

Q You also told me if I recall your testimony yesterday correctly, that there were certain ventilating pipes in king posts that ran through the main deck down the upper 'tween deck or shelter deck.

A Yes.

Q How many of those were there in No. 3 hatch on the starboard or offshore side?

THE COURT: Starboard side and offshore side are both the same?

MR. KAIN: Yes, your Honor.

THE WITNESS: All together, seven.

THE COURT: Seven what?

THE WITNESS: Ventilators and king posts.

THE COURT: Is a ventilator different from a king post?

THE WITNESS: A little smaller in size.

THE COURT: Are there seven ventilators, seven king posts?

THE WITNESS: All together, two holding up the winches -- no, holding the booms.

THE COURT: The winch is the machine that revolves and rolls up or rolls out the cables?

THE WITNESS: Yes.

THE COURT: The boom is the horizontal, more or less, steel beam, is it?

THE WITNESS: Well, a beam -- this is a boom or a derrick.

THE COURT: Where does it start?

THE WITNESS: It starts on the king post.

THE COURT: Before I said winch post. I said winch and I meant the boom -- the beam.

All right.

Now, there are only two posts?

THE WITNESS: Two king posts.

THE COURT: That would make five ventilators?

THE WITNESS: Yes.

BY MR. KAIN:

Q Were there similar fixtures or obstructions on the port side, the other side of the No. 3 hatch?

A Just the same as on the starboard side.

Q Incidentally, Captain, with the hatch boards on and the beams in place on No. 3 hatch, would there be any daylight coming down into the hatch?

A No.

Q How about No. 2 hatch? With the hatch boards in place and the beams, would there by daylight coming down into No. 2 hatch?

A No.

Q Now, Captain, you told me yesterday that the only ladder leading from the No. 4 lower hold to the 'tween deck was located at the aft end of that hold; is that correct?

A Yes.

Q Would you, Captain, referring to the ship's plan, if you find it necessary, tell me the approximate distance in line of sight -- do you know what I mean by "line of sight"?

A Yes.

Q If you look at something in a straight line, could you tell me the approximate distance from the top of the ladder, which comes from the lower No. 4 to the No. 4 'tween deck, to the door of this cargo space at the forward end of No. 4 hatch?

A I should say approximately 55 feet.

Q About 55 feet. Captain, will you assume with me this corner of the Jury box represents the bulwark on the starboard of the reefer box of the aft end of the No. 2 upper 'tween deck? Would you assume that this is the very corner of that bulkhead or wall? Could you tell me how far in this direction (indicating), was the coaming and hatch square of the No. 2 upper 'tween deck, approximately?

THE COURT: From where to where?

Q From the forward corner of this bulwark or wall that contains the reefer box at the aft end of the No. 2 upper 'tween deck, if you stood at this corner and you looked towards the hatch square --

THE COURT: Further forward?

MR. KAIN: Sir?

THE COURT: Forward further?

Q If you stood immediately adjacent to this and looked towards the hatch square --

THE COURT: Which direction?

MR. KAIN: Towards the port side.

THE COURT: Across the ship?

MR. KAIN: Yes, sir.

Q If you looked from this point toward the hatch opening in the No. 2 upper 'tween deck, the No. 2 hatch, would you tell me the distance, approximately, from the corner of this bulkhead to the hatch opening?

MR. KOLONSKY: Your Honor --

THE COURT: You have changed your question. The previous question had the word "coaming" in it. Suppose I ask the question about the opening, and then you could finish your question.

You've got a square of the hatch, an opening?

THE WITNESS: Yes.

THE COURT: About how big is that?

THE WITNESS: It is 28 by 20 feet.

THE COURT: Which is the dimension across the ship?

THE WITNESS: 60 -- 59.

THE COURT: Of the 38 or 20?

THE WITNESS: 20.

THE COURT: 20 is across the ship? Around this opening, the dimensions of which you have just given, there is a coaming. That is about how high?

(Witness indicates.)

THE COURT: Indicating about six inches?

THE WITNESS: Yes.

THE COURT: That is all around the opening?

THE WITNESS: Yes.

THE COURT: Is that coaming right at the edge of the opening or is it set back some distance?

THE WITNESS: Just at the opening.

THE COURT: Right at the opening.

Now, the question of the attorney is, from the corner which he described as the corner of the bulkhead, looking across the ship --

that is from one side -- in this instance the offshore side -- in the direction of the inshore side -- how big a distance is there before you reach the coaming -- up to the coaming, let's say -- its nearest point?

THE WITNESS: Eight to nine feet.

THE COURT: Eight or nine feet. Is that your question?

MR. KAIN: Yes.

BY MR. KAIN:

Q Could you tell me, Captain, how far forward of the reefer box located -- the reefer box located in the aft end of No. 2 'tween deck -- how far forward from that reefer box was the aft coaming hatch square in the No. 2 'tween deck?

THE COURT: Now you are looking forward?

MR. KAIN: Yes, sir.

THE COURT: From the forward end of the reefer box?

MR. KAIN: To the aft end of the hatch square.

THE WITNESS: About two feet.

THE COURT: About two feet. Then the square of the hatch begins?

THE WITNESS: Yes.

BY MR. KAIN:

Q Could you tell me, Captain, what means was used to secure the door of the reefer box locate in the No. 2 upper 'tween deck of the aft end?

A Secured by two wheels.

Q Two wheels?

A Yes.

Q Did it have any other type handle to secure this door?

A No.

Q Was it secured just with a wheel?

THE COURT: You mean you turn those wheels and the doors will open?

THE WITNESS: It will close.

THE COURT: Then you have to turn them the other way to open?

THE WITNESS: Yes.

THE COURT: All right.

At this point we will take our morning recess for lunch. You will return please at 2:15. Heed the admonition I have earlier given you.

(Luncheon recess.)

AFTERNOON SESSION 22

THE COURT: Are we ready to proceed? All counsel are present. Bring the Jury in.

(Jury enters the Courtroom.)

THE COURT: Put your witness back on.

OLAV ROGBERG, having been previously sworn by the Clerk of the Court, resumed the stand and testified further as follows:

DIRECT EXAMINATION

BY MR. KAIN (Cont'd):

Q Mr. Rogberg, could you tell me what the deck of No. 2 lower hold was made of?

A It was wood.

Q Wood?

A Yes.

Q Could you tell me, this ship was port side on July 3, 1967?

A Yes.

Q Could you tell me where on the main deck the head or top of the gangway or accommodation ladder was situated -- that is, the ladder leading from the ship to the pier?

A Just beam of the aft end of the No. 2 hatch.

THE COURT: What does that mean, for the Jury?

Q What do you mean by a beam, Captain?

A Just out from --

Q Directly opposite?

A Yes.

THE COURT: Opposite what?

THE WITNESS: The aft end of No. 2 hatch.

THE COURT: In back of the No. 2 hatch. You would have to walk from the back of the No. 2 hatch across the ship to come to the ladder?

THE WITNESS: Yes.

THE COURT: You wouldn't walk forward, you wouldn't walk aft, you would walk across?

THE WITNESS: Yes.

MR. KAIN: Your Honor, at this time might I inquire if the bailiff has a red pencil?

THE COURT: Yes, give him this one, a marking pencil.

Q Captain, will you indicate on that plan, using the deck plan for the main deck, would you put a square and a "G" where the top of that accommodation ladder --

THE COURT: No, just with your finger.

Will the other attorneys step forward, please?

Read the question back to the witness.

(Question read.)

THE COURT: The "G" standing for "gangway"?

MR. KAIN: Yes. Just put a small square.

(Witness complies.)

THE COURT: That would be the port side of the ship?

THE WITNESS: Yes.

THE COURT: And the deck shown is the top deck?

THE WITNESS: Yes.

THE COURT: And the port side of the ship is the side of the ship alongside of the pier?

THE WITNESS: Yes.

Q Captain, as you have indicated, is that the platform which constitutes the topof the gangway -- is that -- does that project out from the ship's side or is it on the ship itself?

A It is outside the ship's side, yes, on the outside.

THE COURT: Where is it attached, to the ship or the dock?

THE WITNESS: To the ship.

THE COURT: And rests on the dock?

THE WITNESS: Yes.

THE COURT: If the shippulled away, the

ladder would go with the ship?

THE WITNESS: Yes.

MR. KAIN: Your Honor, I have several other things that I would like to have marked. Would it be convenient to have counsel up there?

THE COURT: All right. If counsel wish, step forward and we will have the captain do the marking.

What is the exhibit number of this plan?

MR. KAIN: Plaintiff's Exhibit 3, I believe.

(Counsel stepped forward.)

BY MR. KAIN:

Q Captain, using the deck plan for the upper 'tween deck of the SUNNY PRICE --

MR. KOLONSKY: That is called the second deck on the plan?

THE WITNESS: Yes.

THE COURT: The shelter deck is the deck formed by -- has as its roof the main deck of the ship, and its floor the upper 'tween deck, if there are two 'tween decks, and if there is only one 'tween deck, it is the floor of the 'tween deck?

THE WITNESS: Yes.

THE COURT: That encloses the shelter deck, the space?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. KAIN:

Q Will you, Captain, on that plan on the shelter deck -- upper 'tween deck, would you indicate in No. 4 hatch where the ladder leading -- where the top of the ladder leading from No. 4 hold comes into the No. 4 'tween deck?

THE COURT: That would be to the floor of the 'tween deck?

MR. KAIN: That's correct.

THE COURT: What have you written there?

THE WITNESS: Where the ladder is coming up.

THE COURT: Put an "L" in the white space. "L" with a box indicates the ladder leading from the hold -- the lower hold, one flight up to the bottom of the 'tween deck?

THE WITNESS: Yes.

Q Will you indicate, Captain, where the aft ladder leading from the No. 2 'tween deck to the main deck

at No. 2 hatch, that is the aft ladder in the 'tween deck -- would you indicate on the plan for the 'tween deck where that is located?

THE COURT: You are talking about hatch No. 2?

MR. KAIN: Yes.

THE COURT: Put the "L" there again, ladder.

Q Now, Captain, I direct your attention to the cargo space immeduately forward of the No. 4 upper -- No. 4 'tween deck, rather -- which you describe as having a door at its aft end. Would you indicate the door on the plan for the second deck?

THE COURT: Do not mark it yet.

Do you want him to show the offshore or inshore?

MR. KAIN: The starboard side, your Honor.

THE COURT: Isn't that the port side that you were about to mark?

THE WITNESS: No.

THE COURT: On the upper -- I see.

Read the question back to the witness before he marks.

(Question read.)

THE COURT: At the aft end or the forward end?

MR. KAIN: At the aft end, just forward of the No. 4 'tween deck.

THE COURT: What do you want him to mark, the door or the space?

MR. KAIN: The door, if your Honor please.

THE COURT: That would be the door between the No. 3 and No. 4 hatch.

MR. KAIN: The space immediately adjacent to the motor casing shown on the plan.

THE COURT: Mark it with a "D".

Q Will you now, Captain, mark the forward door of that same space?

THE COURT: You can't have them "D" -- both of them "D". We will make the door, the second one, as "D" prime. He marked it.

Q Captain, will you indicate, again referring to the deck plan of the upper 'tween deck or shelter deck, would you indicate the location of the door on the reefer box -- for the reefer box at the -- in the aft part of No. 2 hatch?

THE COURT: You are talking about the door

of the box itself?

MR. KAIN: That's correct. May we make that "D-2," your Honor?

THE COURT: Yes.

Do you want any further marking?

MR. KAIN: Not right at this time, your Honor.

May I have a moment? Mr. Wolf just asked me a question.

(Pause.)

MR. KAIN: May I at this time pass this plan among the Jury?

THE COURT: No. It is much too complicated. It will take at least three-quarters of an hour and we don't have that much time. You will have your opportunity. You may, if you wish, move the blackboard in front of the Jury and have the captain demonstrate the areas that he has just marked with a pointer, if you wish, but such a clumsy exhibit as Exhibit 3 can not be conveniently passed among the jurors. It will take a lot of time.

Counsel may move in front of the board, if they wish.

MR. KAIN: Is this convenient for your Honor?

THE COURT: It is convenient for me.

MR. KOLONSKY: I can not go in front of that board. There is no room.

THE COURT: Is the pointer there? No room?

Captain, step down from the stand. You made certain markings. Will you take the pointer and then stand to one side, so you will be out of the way of the Jury and starting preferably, I guess, with the aft end, indicate the bow and the stern of the ship, the port side, which was inboard, the starboard side and then identify the four places you marked.

MR. KAIN: Indicate the bow first.

THE COURT: That is the front of the ship.

BY MR. KAIN:

Q Now, indicate the stern.

THE COURT: That is the rear of the ship.

Q Will you indicate, Captain, the port side of the ship?

THE COURT: That is the left side, the port side. That was alongside of the pier, we are all agreed? All right.

The right side would be the starboard side.

Q Will you indicate, Captain, where you marked the ladder leading from No. 4 hold to No. 4 'tween deck?

(Witness complies.)

Q Will you now indicate, Captain, where the door on the offshore staboard side, just forward of No. 4 'tween deck, was marked?

(Witness complies.)

Q That is the aft door, is it, Captain?

A Yes.

Q Will you indicate where you marked the forward door?

(Witness complies.)

Q Will you indicate, Captain, the door of the reefer box?

(Witness complies.)

Q And will you indicate, Captain, where you marked the aft ladder in No. 2 upper 'tween deck?

(Witness complies.)

Q Will you now, going back to the main deck or weather deck, would you indicate where the ship's gangway was?

(Witness complies.)

Q That is the top of the gangway?

A Yes.

THE COURT: And you understand, members of the Jury, that the picture -- the drawing that you have just looked at, is as you would see the ship looking down into it if the top parts were cut away.

MR. KAIN: That's correct. Except for the gangway, that would be looking down on the main deck. All the others you would be looking down as if you cut away the main deck.

THE COURT: All right. You may step back to the stand. You had better move that away.

MR. KAIN: May I mark this for identification, your Honor?

THE COURT: Mark it as Defendant Pedersen's Exhibit.

THE CLERK: One photograph marked Defendant Pedersen's Exhibit H for Identification.

(So marked.)

Q Captain, I show you this photograph which is Defendant Pedersen Exhibit H for Identification, and I ask you if that photograph is a fair representation of the aft starboard corner of the No. 2 'tween deck of the M.S. SUNNY PRICE, with the camera facing port to starboard as it existed on July 3, 1967?

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A Yes, it is.

THE COURT: Suppose I repeat what it is. It is a fair representation of the aft part of No. 2 hatch upper 'tween deck. Picture taken from the port side on July 3, 1967.

MR. KAIN: I offer it into evidence.

THE COURT: No objection. Mark it.

THE CLERK: Defendant Pedersen Exhibit H previously marked for identification, now received in evidence.

(So marked.)

THE COURT: As you look into this picture, which direction on the ship are you looking?

THE WITNESS: Looking towards the starboard side.

THE COURT: This is the starboard side of the vessel?

THE WITNESS: Far into the picture, yes.

THE COURT: In back of you, not shown in the picture, is the port side?

THE WITNESS: Yes.

BY MR. KAIN:

Q Is the ladder shown in that picture, one of the ladders which you marked on this print, which is

Plaintiff's Exhibit 3 in Evidence?

A Yes.

Q Which ladder is it?

A That is the ladder in the aft part of the hatch No. 2.

THE COURT: In back of hatch No. 2 -- towards the back of No. 2?

THE WITNESS: Yes.

Q This ladder?

A That's right, coming from the upper 'tween deck to the main deck or to the upper deck.

THE COURT: The ladder goes from the tween deck -- this is the 'tween deck in the picture?

THE WITNESS: Upper 'tween deck.

THE COURT: The ladder therefore leads from the upper 'tween deck floor on the main deck. The main deck of the ship. That is exposed to the sky?

THE WITNESS: Yes.

THE CLERK: One photograph marked Defendant Pedersen's Exhibit I for Identification.

(So marked.)

MR. KOLONSKY: I have no objection to it.

THE COURT: It is not offered.

MR. KAIN: Unless there is objection, I will then offer it into evidence.

THE COURT: You do not want to identify it before offering it, okay. It has been marked Defendant I for Identification.

MR. KAIN: Yes, your Honor.

THE COURT: Mark it.

THE CLERK: Defendant Pedersen's Exhibit I for Identification, previously marked, now received in evidence.

(So marked.)

THE COURT: I don't know what it is. I will give it first to the witness. I think before you go any further -- let me have that for a moment.

Where is the top of the picture -- it is marked top, I see.

BY MR. KAIN:

Q Will you look at the photograph that was just handed to you, the photograph, Defendant's I in Evidence.

Will you tell me what that is a picture of?

A That is a fair representation of the aft part of No. 2 hatch, showing the door into the reefer box.

Q Is that the way it existed on July 3, 1967,

aboard the SUNNY PRINCE?

A Yes.

THE COURT: Is the door in the front of the reefer?

THE WITNESS: Yes.

THE COURT: Do you wish the witness to mark the photograph in any fashion?

MR. KAIN: Ultimately. I have some other photographs that I would like to mark for identification.

THE COURT: All right.

Counsel might consent to having them go directly into evidence. Why don't you show counsel the several pictures. It might save a lot of marking.

Counselor, you are making objection to a ruling where none was intended. The Court made a suggestion.

I will withdraw the suggestion.

The only question is whether you wish these pictures to go in without further identification at this moment, or whether you wish them to be identified.

MR. KOLONSKY: No objection.

MR. COHEN: No objection.

THE COURT: Mark them directly into evidence.

MR. KAIN: May I note for the record that counsel have all stipulated that the cargo depicted in these photographs was not present at the time of this accident or on July 3, 1967? They stipulated that the structure of the vessel is as shown.

THE COURT: The photographs that are going into evidence now are J, K and L, of the Defendant Pedersen; that is the ship. In those photographs, in addition to pictures of the ship's structure, are some cartons or bales or other cargo, and it is agreed that that cargo formed no part of the picture. It is not cargo that was on the ship at the time.

THE CLERK: So marked, your Honor.

(So marked.)

MR. KAIN: Your Honor, counsel has asked me to place on the record when these photographs were taken. I have agreed to do so.

They were taken in Philadelphia on December 20, 1967.

BY MR. KAIN:

Q Captain, may I ask you to mark on this photograph, Defendant's Exhibit I in Evidence --

THE COURT: That is the aft part of No. 2 hatch showing the door into the reefer box?

MR. KAIN: That's correct.

I should like the witness to mark the two handles or wheels that he referred to this morning.

THE COURT: On the door to the reefer box?

MR. KAIN: Yes, your Honor.

THE COURT: Hold it a second.

Where are the wheels?

THE WITNESS: They are behind that because -- when they close it, they are coming in.

THE COURT: The wheels are behind.

Will you gentlemen come forward?

What are these iron objects that are shown, hinges?

THE WITNESS: No. Steel pieces so the wheel is coming on the outside when closing the door.

THE COURT: At all event. the wheels are in this area. Is this the door?

THE WITNESS: Yes.

THE COURT: Suppose we mark the door with the letter "D". Do I hide anything if we mark it here?

THE WITNESS: No.

THE COURT: The Court has now marked a "D" on the door itself.

You say that the wheels are here and here?

THE WITNESS: Yes.

THE COURT: I will make an arrow pointing to the lower wheel and an arrow pointing to the upper wheel, and I can't visualize the wheel.

MR. KOLONSKY: These look like hinges.

THE COURT: Yes, but he says the wheel is behind the hinges.

That is all on Defendant's Exhibit I in Evidence.

MR. WOLF: These are the hinges here.

THE COURT: This isn't a private conference. I am just trying to do my job.

The witness pointed and I made arrows.

BY MR. KAIN:

Q Does that photograph, Defendant's Exhibit I in Evidence, show a covering of some type for the wheels that you referred to as the means of opening and closing the reefer box door?

A Yes.

Q Could you tell me what the shape of the covers is? What is it? What covers the wheels?

A It is a steel piece that fastens on the door.

Q Could you tell me what its purpose is?

A Well, that is where the wheel is coming in when you are tightening up and close the door.

Q Does it serve to protect the wheel in any way from the cargo being loaded?

A No.

Q The wheel is recessed there. It comes in as you close it?

A This is the steel plate (indicating). The wheel, this one is coming a little out with an angle like this (indicating) so the wheel is made faster -- on the bolt and this bolt is coming open in this steel piece and then you close the door.

MR. KAIN: I understand.

THE COURT: I will not undertake to

describe it for the record because it is not completely comprehensible. The witness has been gesturing throughout and pointing at the picture simultaneously.

May I see the picture again?

Q Captain, I show you this picture which is Defendant Pedersen's Exhibit L in Evidence, and will you tell me what that is a picture of? I am not referring to the cargo. I am referring to the structure of the ship.

THE COURT: What part of the ship?

THE WITNESS: This is a fair representation of the cargo space between -- besides the reefer box.

Q Which side of the reefer box, Captain? Is it the starboard side or the port side?

A The starboard side.

Q Is the camera looking aft or towards the back or is it looking forward or towards the front?

A The camera is looking back.

THE COURT: To the rear of the ship?

THE WITNESS: Yes.

Q And that shows -- that portion of the cargo space on the offshore side of the reefer box; is that correct?

A Yes.

Q That bulwark or wall that we were talking about this morning?

A Yes.

Q Now, Captain, I draw your attention to three circular columns that appear in the background of that picture.

Can you tell me what they are?

A It is two ventilators and one king post.

THE COURT: Is the king post the vertical cylinder?

THE WITNESS: That one (indicating).

THE COURT: To the right and not to the side?

THE WITNESS: Yes.

THE COURT: All right.

MR. KAIN: Your Honor, may I ask the witness to mark each of the ventilators and the king post?

THE COURT: I think he had better mark the side of the reefer box.

MR. KAIN: All right. We can do that, too.

THE COURT: Where is the side of the reefer box, the right of the picture?

THE WITNESS: Yes.

THE COURT: The witness indicates this is the side of the reefer box; is that correct?

THE WITNESS: Yes.

THE COURT: Suppose you put "R.B." here to indicate "reefer box."

The Court has put "R.B." on the reefer box -- side of the reefer box, and we are looking to the rear; is that correct?

THE WITNESS: Yes.

THE COURT: The reefer box is to the right of the picture.

You now want the king post marked?

MR. KAIN: Yes, sir.

THE COURT: Mark the king post, "K.P." and they can put an arrow -- mark it a little ways out.

MR. KAIN: Out here in the white part, Captain.

THE COURT: Make an arrow and put a head on the arrow. "K.P." statnds for "king post."

BY MR. KAIN:

Q Would you mark the two ventilators in that photograph?

THE COURT: Mark it with the letter "V".

Q Will you draw an arrow to each one of the ventilators?

(Witness complies.)

Q Does that photograph, Captain, show any sweat battens?

A Yes, it does.

Q Would you mark on the photograph or indicate the sweat battens shown on the photograph?

THE COURT: First of all, where are they?

(Witness indicates.)

THE COURT: It is a rather large area. Let's see where we could mark it.

Suppose you put "S.W." here and we will make an arrow pointing generally in the direction of the sweat battens.

(Witness complies.)

THE COURT: What did you make?

THE WITNESS: "S.W."

THE COURT: All right. "S.W." meaning sweat battens.

Q I show you Defendant's Exhibit K in Evidence; disregarding the cargo shown in that photograph, will you tell me, Captain, what the photograph is a picture of and in what direction your camera faces, if you can?

A This is a fair representation of the aft end of No. 2 hatch. The camera is facing port side. The port side is --

THE COURT: Looking straight into the photograph and the photograph is marked with the word "Top," where the top of the picture is?

THE WITNESS: Yes.

Q The picture is taken from the starboard side towards the port side; is that correct?

A Yes.

Q Does that photograph, Captain, indicate the passageway between the hatch -- aft hatch coaming and the nNo. 2 upper 'tween deck and the forward wall or face of the reefer box?

A Yes, it does.

THE COURT: Is the reefer box shown on the picture?

THE WITNESS: It is here.

THE COURT: The witness is indicating a structure to the left of the picture.

MR. KAIN: Might I ask the witness to indicate the passageway between the reefer box and the hatch square on the photograph?

THE COURT: This is a passageway on which side of the ship?

THE WITNESS: This is between the hatch coaming --

THE COURT: Cuts across the ship from port to starboard or from starboard to port?

THE WITNESS: Yes.

THE COURT: Would you indicate it first?

THE WITNESS: Here (indicating).

THE COURT: The reefer box is at the left?

THE WITNESS: Yes.

THE COURT: As you face the picture, there are two boards there, one a little longer than the other. Is that the passageway?

MR. KAIN: It has been stipulated that none of the cargo or objects were present there at the time. I am referring to the deck area under the boards there.

THE COURT: Would the forward part here in the picture be part of the passageway?

THE WITNESS: No, that is the starboard side of the hatch.

THE COURT: This place that you are about to mark is a passageway between the two sides of the ship?

THE WITNESS: Yes.

THE COURT: On one side of the passageway is the reefer box; that is the left as you look at the picture, and to the right is the square of the hatch?

THE WITNESS: Yes.

THE COURT: All right.

What will we do, mark the passage?

All right, I will mark the passageway. That is on photograph K.

Q Captain, I show you Defendant's Exhibit H in Evidence and can you identify the ship's officer shown in the photograph?

A That is the first officer, Bertelsen.

THE COURT: Spell it.

THE WITNESS: I'd better write it down. B-e-r-t-e-l-s-n.

THE COURT: You had better write it down.

(Witness complies.)

THE COURT: B-e-r-t-e-l-s-e-n.

You say that is your first officer?

THE WITNESS: Yes.

THE COURT: Picture as shown in Exhibit H; is that correct?

THE WITNESS: Yes.

BY MR. KAIN:

Q Captain, I show you this photograph which is Defendant's Exhibit J in Evidence, and I ask you, can you tell me what it is a picture of?

A Well, it is a fair representation of that cargo space between the reefer box and the ship's side on the starboard side, upper 'tween deck.

Q In which direction is the camera facing?

A To the forward of the ship.

THE COURT: Directly forward?

THE WITNESS: We are looking forward.

THE COURT: That is on the starboard side of the ship?

THE WITNESS: Yes.

MR. KOLONSKY: Hatch No. 2?

THE WITNESS: Hatch No. 2.

THE COURT: Let me see the exhibit.

(Exhibit handed to Court.)

THE COURT: It is J in Evidence, facing forward to the starboard side of the ship in hatch No. 2?

THE WITNESS: Yes.

THE COURT: What would be to the right on that picture?

THE WITNESS: To the right is the ship's side.

THE COURT: The skin of the ship?

THE WITNESS: Yes.

THE COURT: On the left side?

THE WITNESS: That is the reefer box.

MR. KAIN: May I at this time show these photographs to the Jury?

THE COURT: Okay, if they can remember the testimony.

MR. KAIN: May I pass them?

THE COURT: Yes. My assistant will.

(Continued on next page.)

DIRECT EXAMINATION

BY MR. KAIN (Cont.):

MR. KAIN: May I ask the Chief Officer what they represent as he passes each one?

THE COURT: Yes.

Do you want them in any sequence?

MR. KAIN: If it's convenient, I will take them in the sequence they are marked in evidence.

THE WITNESS: That's a fair representation of Hatch No. 2, upper 'tween deck, aft part.

BY MR. KAIN:

Q Which way is the camera facing?

A The camera is facing to starboard.

THE COURT: From port?

THE WITNESS: From port, showing the ladder going from the upper 'tween deck to the main deck, also showing the First Officer staying beside the door to the reefer box.

MR. KAIN: Will you pass that to the Jury, please.

(Photographs passed to the Jury.)

THE COURT: Give them about three at a

time or we will be here an endless amount of time. Just multiply everything by ten minutes and you will see.

Q Would you tell me what that picture is? That is Defendant's Exhibit I in evidence.

MR. KAIN: It is a fair representation of the aft part of No. 2 hatch.

THE COURT: Same hatch?

THE WITNESS: Same hatch, same upper 'tween deck and showing the door to the reefer box.

THE COURT: On the right side?

THE WITNESS: On the right side, yes.

THE COURT: All right.

THE WITNESS: It also shows the wheels used to close the door.

THE COURT: "RB" is reefer box; "KP" -- it's not on that one. Let the Jury see first these two pictures; that will be enough to hold them a while.

Do not question the Captain while they are examining the picture because they will not get the benefit from either the questioning or the picture.

There are two pictures and at each picture you will look for the word "top" and you will be able to hold the picture in its proper position.

BY MR. KAIN:

Q Captain, I show you this photograph. Defendant's J in evidence.

Will you tell me what it is?

A It is a fair representation of the aft part of upper 'tween deck No. 2, starboard side, between the reefer box and the ship's side; camera facing forward.

Q Camera facing forward.

I show you this photograph, Captain, which is Defendant's Exhibit K in evidence and I ask you if you can tell me what portion of the ship it is.

A It's a fair representation of the upper 'tween deck, hatch No. 2 aft part, showing the passageway between the reefer box and the hatch No. 2 coaming.

Q Which way is the camera facing?

A The camera is facing port.

Q Will you look at this photograph which is Defendant's Exhibit L in evidence and tell me what that is a picture of?

A That's a fair representation of the aft part of No. 2

hatch showing the cargo space between the reefer box and the ship's side.

The camera is facing aft and it also shows the reefer box on the right side and the ship's side on the left side, showing also the king post and two ventilators and the sweat battens. The camera is facing aft.

MR. KAIN: Would you pass those, please.

(Pictures handed to the Jury.)

BY MR. KAIN:

Q Now, Captain, on July 3, 1967 at the time the cargo of the Sunny Prince was being discharged, did you have any instructions as to where and when you would thereafter load cargo?

A We was to load --

THE COURT: The question was did you have any instructions?

THE WITNESS: Yes.

Q What instructions did you have? Where were you thereafter going to load cargo?

A Here in Brooklyn.

Q In Brooklyn?

A Yes.

Q When were you loading cargo?

A The next day.

THE COURT: That is July 4th?

THE WITNESS: Yes.

Q Would you look at your logbook, Captain, specifically for July 4 and tell me whether any cargo work was done aboard the Sunny Prince on July 4th, 1967.

A No.

THE COURT: No work was done?

THE WITNESS: No.

Q Was there any work done on July 5th?

A Yes.

Q Where was the ship on July 5th, Captain - was it still in port in New York on July 5th?

A It left at 1945 on July 5.

Q What is 1945? What is that in shore time? 6:45?

A 6:45, yes.

THE COURT: P.M..

Q On July 3, 1967, did you have any conversation with the foreman of the cleaners -- the ship cleaners who were on board?

A Yes.

Q What did he say to you and what did you say to him?

THE COURT: Who is the 'him'?

MR. KAIN: The foreman of the ship cleaners.

A Well, he asked me where to clean and I said the whole ship has to be cleaned.

MR. KOLONSKY: What?

THE COURT: The whole ship has to be cleaned.

Q Did he ask you anything else?

A He did ask me about replacing hatches.

Q He asked you if he should replace what?

A Hatch boards.

Q What did you tell him?

A No.

Q You told him not to; is that correct?

A Yes.

Q Captain, on the occasion when you have been in the Port of New York and at other ports in the United States what has been your practice aboard the ships you were employed on when you came into these ports with respect to covering hatches, when the work was not completed in them?

Do you understand my question? If you are going to work the hatch the next day, if you had not finished at 5:00 o'clock when the longshoremen left the ship, what was the practice that you called at New York and other U. S. ports?

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MR. KOLONSKY: Objection.

THE COURT: I cannot hear you when you are seated.

MR. KOLONSKY: Objection, your Honor.

THE COURT: Suppose we excuse the Jury at this point. They can have their mid-afternoon recess.

(Jury withdraws from the courtroom.)

THE COURT: First of all from the attorney for the ship, what is the purpose of this interrogation?

MR. KAIN: I wish to show, your Honor, through this witness that the practice in all U. S. ports which he has called has to be to cover only the top deck, when the hatch is to be worked the next day or two days later.

THE COURT: What is the basis of the objection.

MR. KOLONSKY: This practice is irrelevant to the issue of liability, the law requiring a safe place for people to work and walk.

THE COURT: That's putting the proposition hind end foremost. The problem here is for the Jury to come up with an answer to the question as to whether the ship was seaworthy.

Whether the ship was reasonably fit for its intended use and you can reach the answer to that question through many avenues.

For the witness, for example, to state that he never covered the hatches under those circumstances, might do more than -- you might do no more than have the witness state what his practice was -- to save money supposedly.

If, however, the inquiry broadens as to what is done generally in the industry, we come closer but not sufficiently close to what the custom and practice is.

MR. KAIN: I don't profess --

THE COURT: I don't think that is the question that you put.

MR. KAIN: Perhaps I will rephrase it.

May I ask the witness if there has been a custom and practice in New York and other ports which he has called with respect to covering hatches aboard the ships?

THE COURT: What is the practice, although you might be confronted by requests by your adversary for a voir dire to satisfy himself that it really is general practice, which

is related, among other things to safety, because I think that the courts are not too happy about principles established and testified to as being established by the shipping industry.

MR. KAIN: I am not producing this witness as an expert witness.

THE COURT: What is he?

MR. KAIN: The business practice aboard the ships on which he sailed. This is what they did.

THE COURT: What does the Jury have to decide here?

MR. KAIN: I think they have to decide, although I don't think as I have indicated in my motion at the end of the plaintiff's case --

THE COURT: In relation to this subject?

MR KAIN: I think they have to decide--

THE COURT: That's the first I hear of it.

MR KAIN: -- whether he was negligent, as Mr. Kolonsky contends, in failing to cover this hatch from top to bottom at any time anyone left the area.

THE COURT: I am just wondering whether

the Jury does not have to decide whether this area is an area to which, under the circumstances here testified to, a longshoreman may reasonably be expected to go.

MR. KAIN: No one has given such testimony -- no one has testified in the Plaintiff's direct case that it was reasonable for the plaintiff to go back and get his hook in the method he went or he wasn't required to ask anyone.

This is part and parcel of the motion that I made before your Honor at the end of the plaintiff's case to dismiss for failure to make out a prima facie case.

THE COURT: I think I will leave to the Jury the determination of what is and what is not reasonable in that area and in view of the fact that this witness is not an expert witness, -- I am quoting you -- I think I will also leave to the Jury the determination of the ultimate question as to what was safe procedure here.

Now, the witness isn't being asked what is safe procedure and I would exclude it if it

were.

We need a better basis for an answer to that question than has thus far been presented. The witness was asked whether he knows --I guess--his own practice - and you broadened that in the absence of the Jury as to what he knows about the practice generally.

Now, let us assume that the practice in the industry generally was that no gangplank should be provided -- no gangplanks - no planks of any kind or rails, that the longshoremen were required to jump from shipside to dockside or in reverse, because that was the universal practice in Patagonia where the accident happened. That would not make it a safe practice and I cite that as an example because it is so grotesque.

MR. KAIN: I maybe mistaken in the citation, but I recall a statement of Judge Hand -- I believe the Bache v. Silverline, which said, in effect, evidence of custom and practice is not conclusive on injury but it is some evidence of what should be done.

THE COURT: You have to reach that point

first and I think one of the things you have to show with respect to custom and usage is that it is a safe practice to start with.

You cannot have a dangerous practice sustained as exempting the ship from liability even if the dangerous practice is followed by all the ships.

MR. KAIN: If your Honor please, I don't think I have the burden in this case -- I respectfully suggest -- I don't have the burden of proving that this is safe practice.

I submit to your Honor that Mr. Kolonsky has the burden of proving that some practice of the ship was unsafe and I submit that there is no such testimony.

I don't construe my burden in this case to prove this was safe practice.

THE COURT: I do not have to permit testimony which may confuse the Jury. The Jury is likely to get the idea that any practice that is long and universally engaged in by the ship officers is a practice which they might consider in exoneration of the claim against the ship owner.

I think you have to go a little further than you have. At the moment with a non-expert witness who has traveled around and who has learned that captains feel that they might just as well -- they might as well leave the hatches open if they are going to work on them the following day, I do not think you could move that very close to a universal practice which is recognized universally not only as an economically desirable practice from the point of view of the ship owner but a safe practice as well.

You know, custom and usage will not knock out claims of negligence in seaworthiness. Custom and usage is shown for the purpose of indicating what it is that the industry considers as a safe practice and I think you ought to approach the problem from that point first before you get right into it and say well, we don't close up our hatches.

MR. KAIN: If your Honor please, may I ask this witness with your Honor's permission --

THE COURT: Let me have the case because I have a high regard for Judge Hand.

Get my Practice and Research File.

MR. KAIN: I think it is Bach, Bach, re Silverline.

THE COURT: We will see if we have it also.

MR. KOLONSKY: Poignon is my reference also, the Texas City disaster case discussed by Justice Jackson.

THE COURT: We will take our own little recess and from the way things are going we will still be trying the case tomorrow with proof. You may step down.

(The witness leaves the stand.)

MR. KAIN: May I go out for a cigarette?

THE COURT: You may go out but the cigarette is at your own discretion.

MR. COHEN: May I be permitted to go down to the lobby?

THE COURT: We are in recess.

(Recess taken.)

THE COURT: All right, gentlemen, Judge Learned Hand is indeed a learned Judge. If one looks hard enough one can find the law clearly stated in his opinions. Then if one continues

to look harder one can find the converse stated in his opinion.

I have Bache v. Silverline, a stowage case in which the libelant was dismissed.

MR. KAIN: I am not sure of that citation.

THE COURT: I have it in case you need it. Bache v. Silverline.

MR. KAIN: Is that Learned Hand?

THE COURT: Yes, 110 Fed. Sec 196 -- 100 Fed. Sec, page 60. That was decided in 1940. Here is a brief excerpt from it.

"The libelant also proved, and indeed it is not disputed, that in all shipments where bales are stowed more than six or seven high, there was some probability of twisting in the lower tiers though apparently the great majority of bales ordinarily come through uninjured.

"They, therefore, build their cases against the ship with this dilemma. If the customary stowage was likely to result in damage either the ship must stow in fewer tiers" ... and so forth.

Judge Learned Hand at an earlier date, in the case entitled T.J. Hooper cited at

60 Fed. 2d 737, had this to say and what he said was held to be so significant that it was cited at some length in the Notre Dame Law Review Issue, 1965, Vol. 41 No. 1 at page -- the page does not appear to be numbered.

At all events the case was decided in 1932. This is what Judge Learned Hand says in that case which also involved property damage. Here, the loss was the barge itself. No personal injury.

"Is it then a final answer that the business had not yet generally adopted receiving sets?" Apparently the practice testified to concerned receiving sets aboard ship.

"There are no doubt cases where courts seem to make the general practice of the calling the standard of proper diligence. We have indeed given some currency to the notion ourselves" and he cites a couple of cases.

"Indeed in most cases reasonable prudence is in fact common prudence but strictly it is never its measure.

"A whole calling may have unduly lagged in the adoption of new and available devices.

It never may set this as its test however persuasive be its usages.

" Courts must in the end say what is required. There are precautions so imperative that even their universal disregard will not excuse their omission."

He cites a series of cases. Then he goes on and says there was no custom. "You have a negligence case, an unseaworthiness case here and personal injuries are involved."

Whether or not the practice was widespread or universal, to leave hatches uncovered under certain circumstances may have some bearing on whether there was a custom in the industry to do that but that is a far cry from saying what does and what does not constitute negligence or an unseaworthy condition.

Not even the Captain himself will say that if the plaintiff had a right to be where he was when he fell that the practice was a safe one, so I will exclude all proof of custom through this witness in response to a question which calls for an answer implying -- although it does not directly include that in the question --

implying that it is a safe practice for the Jury to consider that hatches should be left open when people have to resort to them.

That does not mean that I am going to charge the Jury in any sense that they must find that this plaintiff had a right to go through that passageway and with a flashlight walk through the door there and try and find his gloves.

I am not too sure what he was engaged in at the time. I do, however, make some reference to the fact that they may consider whether or not this was an incidental -- a procedure incidental to his job, as the longshoremen unloading a ship. Whatever it was they have to take into account --

MR. KAIN: If your Honor please, is the testimony excluded on the basis of the form of my question or is your Honor excluding the testimony from this witness on custom and practice.

THE COURT: I am excluding the testimony in the area in which the question is directed with its implication that open hatches if a

customary procedure are safe practices, so far as one walking around in the dark in that general area is concerned It's a Jury question.

This is not a question of stowage and this is not a question of whether a radio should be aboard a barge in order to have the barge more amenable, I suppose, to control.

MR. KAIN: In addition to my exception might I make an offer of proof of this testimony?

THE COURT: You will make your proof by asking questions of the witness until it is clear enough that-- what it is you are proposing to prove.

I found more often than not that counsel have considerably more difficulty in eliciting from the witness, whose testimony is excluded, matter which would sustain the much broader offer of proof.

I will assume, unless you have something else you wish to ask this witness, that what you want to show is that hatches are left open generally --

MR. KAIN: What I wish to show --

THE COURT: Why do you cut in? This is

the third or fourth time. You throw me off stride and I cannot remember what I was saying.

Maybe it is pointless. But let me make a complete record. You have a much more powerful voice than I have, particularly late in the day.

What you are asking this witness - and correct me if I am in error -- you are asking this witness is as to whether or not it wasn't a general practice in Brooklyn and elsewhere at ports where he called, to leave hatches open overnight if there were some work to be done the following day in the same hatch.

Now, just what it was that the work -- I guess there is proof in the case that the next day the ship was to be loaded in hatch No. 2 so I suppose that is why the hatch was left open. That it is an economical practice is perfectly self evident.

It takes fewer people to work the ship if the hatches are already open than if you have to uncover the hatches, but at this point I think it is a Jury question as to whether it is a

safe practice irrespective of any theoretical custom and usage.

For example, if this were an automobile accident case a Court would not take any proof of custom and usage of driving where the results were unsafe. You can probably get in automobile cases plenty of testimony that everyone goes over 20 miles an hour in an area like Orchard Street where they have pushcarts all over the street.

It's for the Jury to say even though that driving is within the speed limit if it is a safe practice.

I will not take proof of this nature which I think will confuse the issues here involved.

MR. KAIN: May I state on the record to make sure that I am clear about it in my own mind, it was my intention to ask this witness based on his experience in the Port of New York and other U. S. ports, is there a custom and practice with respect to covering hatches when they are not being worked and then to ask him, assuming I have an affirmative answer, ask him

what is the custom and practice.

THE COURT. Well, get the Jury in. We do not need an offer of proof there. It would not take many questions to make clear what you intend to do and if anything gets in which may be proof in other areas the plaintiff is entitled to cross-examine.

MR. WOLF: It seems to me there is a degree of propriety in allowing proof custom and practice so as to eliminate the possible conception that this was a unique situation.

THE COURT: I had that in mind but at a certain point the Jury has to make a determination as to what is safe. And that point is reached before you can introduce proof that an unsafe practice is a safe practice.

I can consider the question as to whether the practice was a safe one in this type of case as independent of the answer to the questions as to what Captains do generally in the industry, and the witness is not even an expert by the statement of counsel, the witness is a Captain who for a number of years has been traveling

around in ships and has been doing things and it may well be, even though the key answer is excluded, that he will testify enough in other areas to give plaintiff his opportunity to cross-question him.

I am just curious to know -- I am curious with respect to your situation -- having in mind that you confront only the ship owner in this case.

There is nothing in the case to indicate that the plaintiff is making any direct claim against you.

MR. WOLF: No.

THE COURT: I am curious to know what your interest in the matter is in view of the fact that the Captain already has indicated that the hatches were left open by his direction, at least, that's what I understood.

MR. WOLF: It's true. If I had the opportunity at this time I would make a motion.

THE COURT: I would deny it. But I think you are in pretty good shape.

MR. WOLF: Simply amicus curia in a sense trying to resolve it in my mind.

THE COURT: If you take a look at Richardson -- I have not looked at him for perhaps a couple of weeks -- you will find in his discussion once removed, because Prince is writing the supplements to the original Richardson, that he discusses this subject of expert testimony and he points out that a medical expert would be permitted to go the whole way including the responses to a hypothetical question, which also determines liability, whereas in other areas a plumber, for example, will be permitted to give his expertise only in the area of his professional skill and he won't be permitted to testify in the $64.00 area, so to speak, of liability. And when his testimony is excluded in that area, in my view, the question of custom and usage is also excluded because you exclude his testimony -- his conclusory testimony -- because it's a Jury question.

If it is so simple that even a Jury can give the answer to it, here the Jury's significant question to answer, as I see it, is the question of reasonable use, reasonable fitness for such intended use and if they ever get beyond that,

and answer in favor of the plaintiff, and I don't say that they will, but if they do then no matter what the custom is in the industry there is negligence and unseaworthiness there and I am not directing the Jury to find a verdict but you cannot have open hatches unguarded and darkness where workers have to do their work.

I am assuming they will reach that point so the question as to what the practice is, I feel, is irrelevant.

MR. COHEN: I may say that I join in Mr. Kain's execption to your Honor's ruling and might I be permitted to urge to your Honor that existence of custom and practice is not in my judgment conclusive on the issue of negligence or seaworthiness but I think it has some probative value.

It is some evidence that the Jury may take into account and I think the offer by Mr. Kain is proper.

THE COURT: Your offer is noted, it may be that the Court of Appeals, if it reaches that far or higher, will disagree with what I

have done but in my view the prejudice is so great and the probative value of this testimony is so slight, that, in fact, the subject is not even reached in my view in a case tried with the issues such as they are here. In a situation of that kind I will exercise the wide discretion I have or I will do the same as a matter of law and exclude custom and usage from the testimony given by this witness.

MR. KAIN: Do I understand, -- I do not wish to inadvertently transgress against your Hcnor's direction. I am not to put to this witness questions as to their custom and practice and if so, what is this custom and practice?

THE COURT: What I am telling you is that you are to complete your record before the Jury and not with an offer of proof.

I am not giving you an advance ruling. I don't know enough. I cannot look that far ahead to see what you, with resourceful questioning, can elicit from this witness and until I role on it I will hear no more on the subject.

You better keep on asking question.

MR. KAIN: May I also note on the record, your Honor, just to keep the record straight, I

did not mean to imply this Captain is an expert. I meant to imply -- I did not call him an expert, nor did I attempt to qualify him as one.

THE COURT: It is hard to see how you neither qualified him nor called him as expert but consider his testimony as being offered by an expert.

MR. KAIN: I didn't offer it as expert testimony.

THE COURT: I don't know what it is you are asking. If you have any other witnesses on the subject whom you will qualify you are not barred, I will permit you to ask questions until I see more clearly than I presently do where we are headed for.

(The Jury entered the courtroom.)

DIRECT EXAMINATION

BY MR. KAIN (Cont.):

Q Captain, you told us before we adjourned, did you not, that you had on July 3, 1967, instructed the foreman of the cleaning gang not to replace the hatch boards which he took off in the course of his cleaning work?

A Yes.

THE COURT: You personally did the

instructing?

THE WITNESS: He asked me and I said yes to it. He asked if he was to replace the hatch boards and I said, no.

THE COURT: No, not to replace the hatch boards?

THE WITNESS: Yes.

BY MR. KAIN:

Q Did you also instruct the foreman of the cleaning gang to cover the hatches which had been cleaned on the main deck level, to cover them on the main deck level?

A Yes.

THE COURT: In other words, he was to cover the hatches on the main deck level, but leave the hatch covers off on the lower level where they were off at that time?

THE WITNESS: Yes.

THE COURT: Did you know whether they were off at that time?

THE WITNESS: No, they took them off as they were cleaning.

THE COURT: And you didn't care where they were --

THE WITNESS: They were cleaning the whole ship.

THE COURT: You didn't know the condition of the hatch covers underneath the main deck hatch covers?

BY MR. KAIN:

Q If you know, Captain, who -- I rephrase the question.

If you know, did the ship cleaners put in or take out any hatch beams as opposed to hatch covers?

Did the hatch cleaners take in or put in any of the hatch beams on July 3, 1967?

A No.

Q Was this work all done by the longshoremen?

A Yes.

THE COURT: I don't think we have ever had any testimony on the dimensions of the beams, as distinguished from the hatch boards.

How big are they?

THE WITNESS: About 20 feet long or as long as the hatch is wide.

THE COURT: The beams are laid across the entire width of the hatch and that would be 20 feet wide or more or a little less if the

hatch is a little larger, or shorter. All right.

BY MR. KAIN:

Q Captain, will you tell me, based on your experience as a ship's officer and prior to that as a ship's crewman in the Port of New York and other ports in the U. S., was there a custom and practice with respect to the covering of hatches when the hatch was to be worked the following day, when there was additional cargo to be discharged, to be loaded?

MR. KOLONSKY: Objection.

THE COURT: Just answer yes or no.

THE WITNESS: Yes.

THE COURT: Overruled.

BY MR. KAIN:

Q Would you tell me, Captain, based on your experience in the Port of New York here and other ports in the U. S. what that custom and practice was?

MR. KOLONSKY: Objection, your Honor.

THE COURT: Let me ask him a couple of questions.

The question I understand is whether the hatches underneath the main deck -- that is at the lower deck level, would be covered or

uncovered. That is what the question is directed to.

Now, leaving those hatches uncovered--

THE WITNESS: Yes.

THE COURT: -- is that a practice that saves the ship money?

THE WITNESS: Yes.

THE COURT: I will exclude it.

MR. KAIN: May I have my exception, your Honor?

BY MR. KAIN:

Q Could you tell me, Captain, based on your experience in the Port of New York and other ports in the U. S. was there a custom and practice as to whether hatches and cargo spaces not being worked should be lighted or illuminated where the upper main deck hatch opening has been closed?

THE COURT: Just answer, yes or no?

THE WITNESS: What was the question --

THE COURT: Read the question back to the witness.

(Record read.)

THE COURT: Just answer yes or no.

MR. KOLONSKY: Objection.

THE COURT: Overruled.

Yes or no?

THE WITNESS: No. It is not custom to have light.

THE COURT: You are instructed to answer yes or no as to whether there was a custom.

Was there or was there not?

THE WITNESS: No.

THE COURT: There was no custom either way?

THE WITNESS: No.

THE COURT: Next question.

MR. KAIN: No further questions.

CROSS EXAMINATION

BY MR. COHEN:

Q Captain, on July 3, 1967, when the ship cleaners finished cleaning the No. 2 hatch completely was that about 12:00 o'clock?

A That I can say.

Q All right.

In any event, when they finished their cleaning work in that hatch the foreman of the ship cleaners came to you and you had some discussion with him about the hatch boards?

A Yes.

Q And at that time you told him not to replace the hatch boards but to put the ones back to the main deck?

A Yes.

Q At that time were the hatch beams on the main deck?

A Yes.

Q So that what the cleaners did was to lay the boards over the beams on the main deck level; is that right?

A Yes.

Q Now, in this diagram do I understand that when a person comes up the gangway of the ship he would find himself on the deck right next to this "G" with the square drawn around it on this diagram, which is Exhibit 3?

Is that where you would be?

A Yes.

THE COURT: Juror No. 12, can you see?

JUROR NO. 12: Yes.

THE COURT: You might move over the one space.

MR. KOLONSKY: Does your Honor think the lights are dim?

THE COURT: Yes.

Q Now, Captain, do I understand correctly that

there is a ladder at the aft end of the hatch No. 2 on the upper main deck level that goes down to the 'tween deck?

A Yes.

Q Could you mark this diagram where that ladder is at hatch No. 2?

A I already marked it.

Q Well, could you show us on this diagram where that ladder is located on the main deck level?

A Yes.

MR. COHEN: May I have him step down?

THE COURT: Yes. Here is a pencil.

Put a letter "3" up there -- no, letter "2", I think.

MR. COHEN: The witness has, if I may state for the record, your Honor, made a small red rectangle to represent the ladder at the corner of No. 2 hatch and outside of the hatch he put the letter "2" with an arrow.

THE COURT: That is on the main deck?

MR. COHEN: Yes.

BY MR. COHEN:

Q Can you tell the Court and Jury approximately the distance from the end of the gangway at the top over to that aft ladder at the number 2 hatch?

THE COURT: Do you want to go down there and look?

THE WITNESS: No, there's about 18 feet.

Q Eighteen feet. All right.

Now, I would like you to assume with me that this is the offshore or starboard side of the reefer box in the No. 2 hatch and in this corner is the forward starboard corner of that reefer box.

Now, as a person comes by that reefer box in this position and turns around that corner, where in relation to that person, standing at the very corner, where is that aft ladder located?

THE COURT: We had better get ourselves organized.

Are you walking forward or aft?

MR. COHEN: I am going to stand still at the corner. This is the forward starboard corner of the reefer box.

THE COURT: You have to turn to the left?

MR. COHEN: Yes.

As you come walking from the aft end of the ship forward and you come to the reefer box and you get to the corner and make the turn to your immediate left and you stop, where in

relation to where you are standing is the aft ladder located?

THE WITNESS: On the aft side of the hatch.

BY MR. COLEN:

Q About how far away in feet?

A About 28, 29 feet.

THE COURT: That's the only ladder at the aft part of the hatch, No. 2 hatch.

Q As the Chief Officer on the Sunny Prince on July 3, 1967, were you also the cargo officer of that ship?

A Yes.

Q And can you tell us what the cargo officer is; what his duties and responsibilities are?

A The cargo officer is in charge of loading and discharging cargo of the ship. That means he is telling the foreman of the longshoremen where to place the cargo or to secure if that has to be done.

THE COURT: That's when the ship is being loaded.

THE WITNESS: During unloading, too.

THE COURT: During unloading, also.

THE WITNESS: No, they are just taking out the cargo.

THE COURT: I just asked you that. Securing the cargo is an operation performed only when cargo is being loaded?

THE WITNESS: Yes.

THE COURT: Unloading you don't have to secure the cargo, they put it into the sling and hoist it out?

THE WITNESS: Yes.

BY MR. COHEN:

Q Are you familiar at all with the cargo of shrimp that was discharged from the No. 2 reefer compartment on July 3, 1967?

A Yes.

Q Can you tell the Court and Jury - can you tell the Court and Jury what - how the shrimp was packaged?

MR. KOLONSKY: Your Honor, I object to this. I don t think it is relevant. We have gone over the packaging of the shrimp already.

THE COURT: Through this witness and this lawyer?

MR. KOLONSKY: No.

THE COURT: He can do it.

Read the question back to the witness, please.

(Question read.)

THE WITNESS: It was packed in cartons containing about 50 pounds.

THE COURT: You have indicated about--

Q You have indicated in your hand, could you tell us in terms of feet, the approximate dimension of each of those packages which you estimate weighs about 50 pounds?

A Little more than one foot by one foot in a square.

THE COURT: Little over one foot in each dimension.

Q Is there some tally - you understand what I mean by tally?

A Yes.

Q Is there some tally kept of the quantity of the cargo that is discharged from a ship as against the amount that was loaded into it?

A Yes.

Q Is there such a thing called overshort or damaged cargo report?

A Yes.

Q Do you, as the Chief Officer and Cargo Officer, have any duties or responsibilities in connection with the tally of the cargo and the overshort and damaged reports?

A Yes.

Q Could you tell us your job and your duties

in connection with that?

A If there is shortage during discharging the foreman comes and says what it is, showing that it is a shortage and I just have to agree with him.

Q Are you the officer on board the ship who would get the report if there is any shortage of cargo?

A Yes.

Q From whom do you receive these reports?

A They can be from the tally men. Or can be from the - one of the ship's officers who are also on deck.

MR. KOLONSKY: I didn't hear.

THE COURT: Who are also on deck, ships officers.

Q Now, were you present aboard the ship at the time that this accident occurred,which we are told was approximately 1:20 in the afternoon of July 3?

A Yes.

Q And did the accident come to your attention that day?

A Yes. I was standing on the pier when I was told.

Q After you were told did you go aboard the ship to the No. 2 hatch?

A Yes.

Q And had the man who had been injured, had

he already been removed from that hatch by the time you got there?

A No.

Q He was still there?

A Yes.

Q Did you go down into the hatch itself?

A No.

Q Was any ship's officer down in the hatch at that time?

A The First Officer.

Q What was his name?

A Bertelsen.

THE COURT: He was under you?

THE WITNESS: Yes.

THE COURT: You were the Captain?

THE WITNESS: No, I was the Chief Officer not the Captain.

Q Did Mr. Bertelsen make any report to you either orally or in writing?

MR. KOLONSKY: I object.

THE COURT: Overruled.

Yes or no?

THE WITNESS: Yes.

Q And did he in his report make any reference to

you as the Cargo Officer about the cargo that had been in the No. 2 hatch?

A That, I can't remember.

Q How long did you remain on the deck in the vicinity of the No. 2 hatch before the injured man was taken out?

A I was there until he was taken out.

Q Sorry?

A I was standing on the deck until he was taken out.

Q Approximately how long did that take?

A Oh, five to ten minutes.

Q I see.

After he was taken out did you thereafter go down into the hatch?

A No, I went -- when he was taken down on the pier I also went down there.

Q I see.

Did you later go down into that hatch?

MR. KOLONSKY: Objection.

THE COURT: I will rule on the objection tomorrow morning.

Members of the Jury, we have reached the recess time now and I give you the same admonition that I have given you so many times

before.

Good night. Please be here punctually.

(The Jury withdrew from the courtroom.)

MR. KOLONSKY: As I have tried so many times before, I attempt once more to replace the hospital record which is purely mimeographed with a clearer photostatic copy which I hold in my hand.

THE COURT: That is something you could agree upon with counsel.

MR. KOLONSKY: I have asked them.

THE COURT: If there is any problem you could take it up with the Court.

MR. KOLONSKY: There is.

THE COURT: In the meantime we have an exhibit and if it creates too many problems for you I will insist that they straighten it out.

MR. KOLONSKY: It's also more blurred than that.

THE COURT: Keep it available, we may have to use your copy.

We will take the original and straighten it out.

* * *

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C A P T. R O G E L B E R G, having been previously duly sworn, resumed the witness stand and testified as follows:

MR. KLONSKY: May I inquire as to whether this is considered direct examination by Mr. Cohen?

THE COURT: Those are questions --

MR. KLONSKY: Is it direct? Because I will raise my objections, if any, on that basis.

THE COURT: I don't follow. Technically it is called cross-examination, but the Court will not consider that the witness is hostile to the examining attorney; it may appear that he is.

MR. COHEN: May I proceed, your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. COHEN:

Q Captain, I think yesterday we were talking about you were present when Mr. Rodriquez was taken out of the hatch and brought on the pier following the accident?

A Yes.

Q And did you yourself go on the pier?

A I was there when he was taken down to the pier and I was there when he was taken into the ambulance.

Q In other words, you remained on the pier until Mr. Rodriquez was taken away by ambulance?

A Yes.

Q How long did that take, approximately?

A Just a few minutes, five minutes or so.

Q After Mr. Rodriquez was taken away by ambulance what did you do?

A I went back to the ship.

Q Did you go back to number 2 hatch?

A Yes.

Q Did you see First Officer Berglson at that time?

A Yes, he just came out of the hatch.

Q He had just come out of the hatch?

A Yes.

Q Did he at that time make any report to you regarding the cargo in the hatch?

MR. KLONSKY: I object to this.

THE COURT: Who is objecting?

MR. KLONSKY: I will object, your Honor, as to what one officer told another officer.

THE COURT: I don't consider this as more than a verbal exchange. Read the question back.

(Reporter read as directed.)

THE COURT: YEs or no?

THE WITNESS: Yes.

Q What did he report to you at that time regarding the cargo in the hatch?

MR. KLONSKY: Objection, your Honor.

THE COURT: This is the defendant's witness, and you are associated with the defendant in defending against his claim. I will sustain the objection.

MR. COHEN: May I be heard for a brief moment?

THE COURT: No. Next question.

Q As a result of what Mr. [redacted] reported to you, did you give any instructions to the crew -- members of the crew regarding the cargo in the number 2 hatch?

A Yes.

Q What orders did you give regarding any cargo in number 2 hatch?

MR. KLONSKY: Objection.

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THE COURT: Is this being presented as foundation for any physical acts?

MR. COHEN: Yes.

THE COURT: Get the physical act, so we can see its relevance, and then I will take up its relevance to the elicitation of the physical act and regarding any verbal plan.

Q Thereafter, did any member of the crew go down into number 2 hatch?

A Yes.

Q Did they bring anything up from number 2 hatch that you saw?

MR. KLONSKY: I object to this.

THE COURT: Overruled.

A Yes.

Q What did they bring up with them from the number two hatch that you saw?

A case of -- a case of shrimps.

THE COURT: What time of day was this?

THE WITNESS: This was just after Mr. Rodriquez had been taken away by the ambulance.

THE COURT: I couldn't hear his answer.

MR. COHEN: Just after plaintiff had been

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sent away by ambulance is what the witness just said.

MR. COHEN: Try to reach me -- I will stand back here.

THE COURT: So some crew members brought up from hatch number 2 a carton of shrimp?

THE WITNESS: Yes.

Q Can you describe for us the size and approximate weight of that case of shrimp?

A It was one of the cartons we had in cargo, a little more than a foot --you know -- a cube of a cube.

THE COURT: A cube, a little over a foot in each direction?

THE WITNESS: Yes.

THE COURT: Are you saying that the carton of shrimp, which were stored in the hatch and which had been removed earlier that day had some sort of markings or identification symbol on them?

THE WITNESS: Yes, they all have.

THE COURT: And did this additional carton onecarton that was brogght up, have the same markings?

THE WITNESS: Yes.

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THE COURT: All right.

MR. COHEN: May I now go back to the other question I had asked, as I developed the physical fact, your Honor?

THE COURT: I don't see that any narrative conversation would be relevant in this connection. A case was brought up.

Q Where did the members of your crew place this case of shrimp that they brought up from the number 2 hatch at the time you described?

A They just left it on the deck besides the hatch.

Q On the main deck beside the hatch?

THE COURT: How far away were you?

THE WITNESS: I was standing there.

THE COURT: They dropped it where you were standing?

THE WITNESS: Yes.

Q Did you thereafter have any discussion with the stevedore foreman regarding that particular case of shrimp?

A I informed him --

THE COURT: Just answer yes or no.

A Yes.

THE COURT: We will have to excuse

the jury. I can't see where this is leading us -- I say that literally. I just don't see where it is taking us to, so I cannot make rulings with any real understanding.

Step out for a moment, please.

(The jury leaves the courtroom.)

THE COURT: These are events after the accident, and unless they are tied in with the plaintiff in some sense which binds the plaintiff, they would not appear to be admissible. However, enlighten the Court, either by interrogation or by an offer of proof --

MR. COHEN: I think, your Honor, that had the witness been permitted to answer the questions that Mr. Klansky objected to, your Honor would have seen that First Officer Bertelson reported to Chief Officer Rogelberg immediately upon his coming back to the hatch after the ambulance took the plaintiff, Mr. Rodriquez away, that the First Officer found a case of shrimp that had been left in that hatch. There were no hook or gloves found in that hatch. The Chief Officer instructed

the seaman to discharge that single case -- put it on the deck; and gave instructions to the stevedore foreman to remove that case from the deck off to the pier with the other cases that had been discharged.

THE COURT: Is it your contention that those circumstances are sufficient to suggest that the reasons which brought the plaintiff into that hatch was not the recovery of tools, which he required for his services on the ship, but a case of shrimp which he was going to steal?

MR. COHEN: Yes, sir.

MR. KLONSKY: May I be heard onthat, Your Honor?

THE COURT: Yes.

MR. KLONSKY: This is an interrogatory addressed to the ship owner with respect to what he claims that the defendant did wrong, and as I read it, there is nothing here as to his return for any profit. That is the ship owner.

THE COURT: That is the ship owner? Of course, this is an employee of the ship.

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MR. KLONSKY: I think the reason why Mr. Cohen did not ask these questions is because Mr. Cohen felt he might be bound by answers which the witness gave.

MR. COHEN: Please --

MR. KLONSKY: This is an inference on my part.

There is also the time lapse, which is not from when the ambulance took the plaintiff away, but the time lapse from 11:00 o'clock until this time where the ship cleaners, 12 of them, cleaned out this hatch.

THE COURT: You have two different elements here involved. One is the presence or absence of gloves. I think that the plaintiff -- or the defendant, rather, can show that there were no hook or gloves.

MR. KLONSKY: May I be heard?

THE COURT: Please. There was no hook or gloves in the area.

On the other hand, I think that the question of what the significance of a single case of shrimp was in relation to the plaintiff's trip into the area, is remote

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and speculative, and inthe absence of some proof which more directly pinpoints the plaintiff as somehow tied in with that single case of shrimp, I would exclude it -- that is, temporarily. There were too many people aboard that ship, and as a matter of fact -- of course, the cleaners have nothing whatsoever to do with the shrimp.

MR. COHEN: That's the point.

THE COURT: But there were ten people aboard --

MR. COHEN: May I call your Honor's attention respectfully to the fact that the testimony in the plaintiff's case, including that fromthe plaintiff himself, has been that when he left at 11:00 o'clock, all of the shrimp he said, had been removed; and there was no more shrimp left in the hatch.

The testimony from the cleaning foreman, who was Mr. Klansky's witness, was that when his men went to the hatch, the longshoremen had finished their work, and therefore, I submit to your Honor, the proof of the fact

that when the longshoremen left the hatch, there was a single case of shrimp left behind; and that no gloves and hook were found either by the cleaners as testified by Mr. Klansky's own witn4ss, or by the ship officer, after this accident.

THE COURT: How did the cleaner testify? I don't recall the testimony.

MR. COHEN: I asked Mr. Scanello whether he was present with his men; and he said yes; and whether he had come across any hooks or gloves during the course of his cleaning; and he said no. I have a clear recollection of having asked him these questions, and the fact that gloves and hook were not found, and a case of shrimp was found can give rise to an inference on the part of the jury.

THE COURT: You have got enough in to argue tothe jury. But unless there is something -- his fingerprints on the shrimp -- that's an exaggeration, of course, -- but something like that, that would tie him in more closely to the shrimp as being the objective of his visit to the area rather than the search

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for the hook and gloves -- I will exclude it. Too much Sherlock Holmes.

MR. COHEN: Is your Honor striking the testimony?

THE COURT: I haven't stricken the testimony. They found shrimp there, and they didn't find gloves.

MR. COHEN: On the issue your Honor is discussing now, may I refer your Honor to the Barnes case, which I cited in my requests to charge, which I think presents a very analogous situation, and more specifically to the last paragraph.

MR. KAIN: BArnes vs. Rederi A/B Fredrika, 350 F. 2d 865, 4th Circuit 1965.

THE COURT: What is the situation in the case?

MR. KAIN: May I show your Honor?

(Mr. Kain gives document to the Court.)

THE COURT: This is elementary -- whether the longshoreman was at a place where he is expected to be or not. This doesn't involve a theft, does it?

MR. KAIN: If your Honor would read the

last paragraph, there is a question of whether the plaintiff was there, ---

THE COURT: All right. I am just looking at the syllabus.

AT least, defense counsel will agree at a minimum, the Court permits the attorneys in summing up to the jury -- the attorneys for the defendant and associated parties, to refer to the physical facts and to present an argument. The Court does as much as it can be called on to do.

I am not going to charge the jury that they can draw an inference. I can't -- and I don't know how much proof will come into this case after this -- after the testimony concerning this has been completed; nor whether there will be rebuttal evidence.

The plaintiff may take the stand and deny -- and surely it is relevant -- that he came in for anything other than his hook and gloves. And he doesn't care whether they found it or whether it fell down to a lower hold, or what happened to it. He can testify to that, if he chooses.

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And the jury, under proper instructions and in other areas can decide whetheror not he went in there to steal the shrimp, or whether the accident happened the way he said it did.

MR. KAIN: And for the reasons.

THE COURT: There are two ways of presenting a general denial. This comes from my State Court practice. One is by a specific denial of an allegation in a complaint; and the other is by alleging affirmatively some fact which would make it impossible for the allegation of the complaint to be true.

Typical of that would be an allegation that Joe Doakes was driving an automobile on Broadway and 42nd Street, and struck the plaintiff. That can be denied, and you can disprove or you can plead and then disprove -- either that it didn't happen that way at all, or that on that very day and that very hour, the defendant was in Chicago.

Now, what you are showing through this witness -- incidentally, that's why I didn't permit you to go into any of the conversation

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unless the conversation is required to explain the physical act. I don't see that it is. I don't let you go into that because the witness is testifying to no more than you will have available for argument to the jury.

Now, suppose one of the other men had said to this witness, "I don't like this fellow. He is the guy that got hurt. I got a hunch that he went in there to steal. He was walking around on tiptoe all the time this morning, looking to the right and looking to the left." Well, that would be inadmissible -- but I would permit you to describe the actions of this fellow as he walked around on tiptoe and looked to the right and left to see if anybody was watching him; and nobody saw him hide the case of shrimp. All that is a possibility, and once you start getting conversation in on a theory that it's a verbal action, as an alternative to its being excludable as mere hearsay, we are in difficulties, because upstairs they may take a dim view of what the Court is permitting to come in.

And here in this next to the last

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paragraph, the words chosen are exact and intentional. The District Judge overcautiously we think -- not erroneously -- overcautiously told the jury it could not consider whether Barnes had been stealing beef. Evidence on this point was irrelevant to establish it only by inference that Barnes had not gone around the cargo bulkhead in his work, but instead periodically.

Now, the jury is the one authorized to draw these reasonable inferences, and the Court is not supposed to present possible inferences on such facts that they slant one way or the other.

I think counsel -- especially with three counsel for the defense summing up, should be able to get across to the jury without repetition their own theory on what this plaintiff was doing in that area.

MR. KLONSKY: May I rise to except. You say you might allow them to infer. I believe this would be an inference on an unproven fact; it would be improper.

THE COURT: It's not an inference on

an unproven fact. If there was a case of shrimp, that's a fact, if the jury so finds it, and the inference that they draw as to whether the shrimp had some relationship to the plaintiff will in a sense be tied in with other inferences which they can draw from the testimony of witnesses other than the plaintiff as to the existence or non-existence of a glove and a hook in the area where it was supposed to be.

You can sum up without difficulty for either side. Whether I would persuade the jury one way or the other, I don't know, but I am not the lawyer, and I won't sum up for either side.

We are told to give our instructions in general rather than specific fashion when we are dealing with the critical issues of fact.

MR. COHEN: May I say, your Honor, I believe that since this witness is the cargo officer, he should be able to testify in his capacity as cargo officer, that he received a report that a case of shrimp had

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been found in number two, without going into what the report was.

THE COURT: He has described the shrimp, and if you have an official report -- you mean orally -- that he received an oral report?

MR. COHEN: That he was given an oral report that a case of shrimp had been found in number 2.

THE COURT: I am sure that when the officer brought up the shrimp, and dumped it at his feet,--and he was the one who brought out the fact that he was standing right there when they put it there -- I am sure the officer didn't say, "Here is a Gillette safety razor," it was shrimp. And I asked the witness whether the markings on the box were the same as the rest of the cartons in the hatch.

MR. COHEN: May we resume?

THE COURT: When you get the jury in. Stay away from hearsay conversations, because if I have any doubt, I am going to keep them out.

MR. COHEN: I have only one more question to ask.

THE COURT: Get the jury in.

THE COURT: You have the situation. I think you have it in relation to a missing witness. I will let the lawyers argue whether it should be brought, or should not be brought in in my charge -- it would be in the most general sense.

(Jurors enter courtroom and take their seats in the jury box. All jurors present.)

DIRECT EXAMINATION

BY MR. COHEN (continued)

Q Capt. Rogelberg, can you tell us whether either First Officer Bertelson or any of the members of the crew who went down into number 2 hatch after this accident found longshoreman's gloves and a hook in the hatch?

MR. KLONSKY: Objection, your Honor.

THE COURT: Sustained.

MR. COHEN: I thought -- all right. No further questions.

THE COURT: You can prove that directly, but he can't testify as to what others did, not in his presence.

Mr. Wolf?

MR. WOLF: No questions.

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THE COURT: Cross.

CROSS EXAMINATION

BY MR. KLONSKY:

Q Mr.Rogelberg, you have the log in front of you?

A No.

THE COURT: Get the logbook, please.

Q Please turn to date of the accident, July 3, 1967. Is there an entry about this accident?

A Yes.

THE COURT: Who made it?

THE WITNESS: First mate Bertelson made it.

THE COURT: Officer Bertelson made the entry?

THE WITNESS: Yes.

Q The same man that came up with this box of shrimp?

A He told about it.

Q Read the entry about the accident. Translate it for us, please.

A At 1320 -- that is 1:20, p.m.

Q Right after lunch?

A Yes. This longshoreman gone from hatch number 4 'tween deck, and into hatch number 2 to get the hook he

had left in number 2 hatch where he had been working earlier that day.

Q Went to get a hook does it say?

A Yes.

Q Go on.

A Hatch 2 had been covered, and was dark there --

THE COURT: And was dark there?

THE WITNESS: Yes. Upper tween deck and lower tween deck was open. The longshoreman fell down from the upper tween deck and into the lower hold, and damaged himself. Ambulance was called immediately and came shortly . In the meantime the man had been taken out of the hatch on a stretcher. He was right away sent to the hospital.

Q And does it say what the stevedore's name was?

A No.

Q Did not give the name J. Rodriquez?

A No.

THE COURT: Did you have any other accident on that ship that day?

THE WITNESS: No.

THE COURT: We will take it that it was J. Rodriquez.

Q Is there any mention anywhere in this log about a box of shrimp?

A No.

Q Sir, Mr. Bertelson works under you?

A Yes.

Q And you were the cargo officer?

A Yes.

Q And as cargo officer you had certain duties did you not?

A Yes.

Q You testified earlier it was to see that the cargo came out safely and went in safely, is that true?

A Yes.

Q Did you also have a duty with respect to the area of safety for longshoremen who work there?

MR. KAIN: If your Honor please --

THE COURT: That question is much too broad.

Q All right. I will put it this way:

THE COURT: Specifically for that day, because the ship may have been handled in a different way on a different occasion.

Q On this day was it one of your responsibilities to see that longshoremen who work on your ship had a safe place to work?

MR.KAIN: If your Honor please, I object to this, your Honor. This is a question for the jury -- leads to a conclusion.

THE COURT: What were your duties with respect to the place where the longshoremen were working?

THE WITNESS: If I told them what to do? I just told my foreman not to tell them anything because they have experts in this matter.

THE COURT: That's what they would tell you. But what were your duties, if any, with respect to the area in which you were working? Did you have some duties; did you have a great many duties, or what?

THE WITNESS: Yes, I did have some duties, but I cannot control these longshoremen.

THE COURT: He asked about the place, not the longshoremen. For example, hatch covers. Did you have a duty with respect to hatch covers?

Did you have a duty with respect to hatch covers, whether they were on or off?

THE WITNESS: I would say no.

Q Captain Rogelberg, these hatch covers are property of the ship, are they not?

A Yes.

Q And if there is anything wrong with these hatch covers with respect to safety of longshoremen working there, did you have a responsibility not to talk to the men, but to talk to the hatch foreman, or ship foreman with respect to any danger that you observed.

MR. KAIN: I respectfully object. There is no testimony here with respect to hatch boards or hatch covers.

THE COURT: Read the question back - unless counsel wishes to rephrase it.

MR. KLONSKY: I will rephrase it, your Honor.

THE COURT: Make your questions shorter. The man has a fairly good command of English, but I understand English is not his native tongue.

Q In your capacity as Chief Mate, if you observed a dangerous condition where longshoremen are working, did you have a duty or responsibility to either correct a danger, or bring it to the attention of a foreman or hatch boss?

THE COURT: Or what?

MR. KAIN: I object, your Honor.

THE COURT: I will allow him to state what his duties are.

A Yes.

Q And what are those duties?

A If it was a bad hatch cover, I would get a new one.

Q And if you see a method of work that is unsafe by the manner in which the longshoremen were working, did you have a duty to talk to the hatch boss or ship foreman about that ?

MR. KAIN: I object, your Honor.

May we have a side bar conference?

THE COURT: Yes.

(The following proceedings were held not in the hearing of the jury, at the side bar.)

THE COURT: The difficulty with your questioning is that you are walking away

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from your case.

All that is involved here is whether the hatch covers were on or off; and if you wish to ask a general question that doesn't describe conditions that here exist, in addition to asking the specific question as to whether he had authority to give the cleaning people the instructions to cover or uncover, you may.

But the general question would be: And you have a great many duties beyond that, do you not? His answer would be yes, presumably, otherwise you are going to confuse the issue with Mate, hatch boss, and other things that have no relevancy.

Isn't that your point?

MR. KLONSKY: That's part of it.

Also, part of it, the purpose of this question if information is to be elicited from the witness on the legal conclusion, our courts have ruled those responsibilities, when this has been turned over legally, whether it is the ship or stevedores.

THE COURT: This witness is an employee,

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and he is testifying as to the scope of his employment as it was given to him.

If you object that he hasn't laid a foundation under it, I will instruct the attorney to ask him when he was hired; and where he was hired; and what he was told he was supposed to do, what his duties were.

MR. KAIN: I also object to it as improper cross-examination. There isn't any question here with respect to hatch boss.

THE COURT: You have two claims; not only unseaworthiness, but negligence.

MR. KLONSKY: Not of the defect of the hatch board, your Honor.

THE COURT: I don't want to tell you how to try your case, but without rushing you in the least, you are home so far as the witness is concerned, because he has testified that if there was an empty open hatch, he gave the instruction -- and nobody is saying he exceeded his authority when he said it. You want to prove that he had the right to give the instruction.

65 1 You may, but to me it's silly.

(End of proceedings held at side bar, not in the hearing of the jury.)

THE COURT: You say you gave the instruction to the cleaning foreman to leave the hatch covers in the upper and lower tween deck where they were?

THE WITNESS: When they took them away, I said it was not necessary to replace them if they took them away during cleaning.

THE COURT: Leave them where they are?

THE WITNESS: Yes.

Q And that was within your scope of authority? It was your job to tell them that?

MR. KAIN: If your Honor please, the defendant conceds --

THE COURT: That's part of your job, to tell the cleaning people?

THE WITNESS: Yes.

Q Now, sir, talking about the cargo space in the shelter deck which runs from hatch number one to hatch number 6, Between hatch number 3 and the reefer box in hatch number 2, was there a door by that entrance way to number 2?

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A No.

Q When the counsel talked to you about this being the side of the reefer box, and then turned where the ladder, was there any door there?

A No.

Q Open?

A Yes.

Q And when we talk about getting into this space at the after end of number 4, through a door, is there any picture that shows this door?

A No.

Q Was this door locked?

A No.

Q Is it left open?

THE COURT: It was a double door?

THE WITNESS: Yes.

THE COURT: The witness had testified it was a double door with upright rods.

Q And it was not locked?

A No.

Q Was there any notice or signs stating that no one should go in there?

A No.

THE COURT: Or that there was an open

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hatch if anybody went in?

THE WITNESS: No.

Q This area which ran from the after end of number 3 to the forward part of the number 2 -- sorry -- from the forward part of the number 3 -- after part of the number 3, when you came in from 4 hatch to the after part of number 3, this area was for the loading of cargo?

A I suppose it is cargo space, yes.

Q And at that time on July 3, '67, there was this cargo in the off-shore space of way?

A No.

Q So a person could walk through this entire area without being stopped by anything in his way?

A If he was very lucky, yes.

Q There was no cargo there, and all you had were the covers for the deep tank and ventilator, and suppose without cargo you could walk past that deep tank?

A Yes.

Q And when cargo work is to be done in this area, it's done by longshoremen?

A Yes.

Q Who come into it regularly to load and

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un --

THE COURT: That's where they do cargo work, also between 4 and 2?

THE WITNESS: Yes.

Q And when they go into that area to do cargo work, does the ship supply light?

A Yes.

Q They call them cluster lights?

A Yes.

THE COURT: What are cluster lights?

THE WITNESS: In --

THE COURT: Show the jury. I know the answer. Tell it to the jury.

They are portable lights in a cluster?

THE WITNESS: Yes.

THE COURT: Multiple lights -- more than one light?

THE WITNESS: Yes.

Q They also go in with flashlights?

A No.

Q Now, sir, in all the time you served aboard this ship, whenever there was cargo work involving this area, you had seen hundreds and hundreds of longshoremen in the hatch?

A Yes.

Q And it was your advice to the cleaning foreman to cover the main deck of number 3, wasn't it?

A No. The main deck was covered by the longshoremen.

Q Didn't the cleaners leave after the longshoremen?

A Yes.

Q Did the foreman of the cleaners come to you and say should I cover up the main deck, and you said yes?

A Yes, they just removed a few hatch boards to do their cleaning.

Q After they were through, you told them to cover up?

A Yes.

Q And when you covered up the main deck, was there any daylight down below?

A No.

Q Before you told them to cover up, there was daylight down below?

A Yes.

Q You had Montreal cargo in some of this

ship?

A Yes.

THE COURT: Cargo to the City of Montreal?

THE WITNESS: Yes.

Q Which you discharged in Brooklyn?

A Yes.

Q May I ask you why it was not carried to Montreal?

A It was not very much cargo,and the charterers wanted to -- they didn't want to have the ship any longer. So they said we will take the cargo ashore and send it to Montreal at our expense.

Q Let us talk about this charter. This was a time charter?

A Yes.

Q The men on the ship, the captain, officers, ordinary, engineers, and stewards, they were all paid by this defendant, by Rederi.

A Yes.

Q What does Rederi mean?

A Ship owners.

Q The number 2 hold itself had two tween decks, didn't it?

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A Yes.

Q And do you say that the bottom of the number 2 hold was constructed of wood?

A Yes.

Q Wasn't it wood over concrete or steel?

A It was steel, the double bottom tank.

Q And this wood, was it damaged?

A No, thick wood planks.

THE COURT: Indicating an inch and three-quarters to two inches.

Q Between 10:50, as appears in your log, and 1:20 is the time of the accident -- were there any longshoremen in the number 2 hold?

A No.

Q There were cleaners there, right?

A Yes.

Q The cleaners were there after the longshoremen had left?

A Yes.

Q How long had they been there, do you know?

A The cleaners came on board at 9:00 o'clock in the morning, and was working in the hold ship.

Q Do you know how long they were in number 2 hatch?

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A No, I can't say.

Q You had two other gangs working on that ship?

A Yes.

Q In the after part?

A One in hatch number one, and one in hatch number 5.

Q One in 5?

A Yes.

Q Did you tell the cleaners in which hatch to work?

A I just told them that the whole ship had to be cleaned, and they just went whereever they saw they could work.

Q Did they work in the hatches that were empty?

A Yes.

Q Or did they work in the hatches that were being worked by longshoremen?

A Yes.

Q Both?

A Yes.

Q Which first, do you know?

A As I remember, they lit it up, and was working

all over the ship.

Q Let me ask you this: as a matter of procedure involving your expertise as a chief mate, should another gang or other workers be sent to the same hatch to do certain work with longshoremen, or working --

MR. KAIN: Objection, your Honor.

THE COURT: Go ahead.

I don't understand the question. "Should" means the proper procedure.

Q Is it proper procedure to have another gang work in the same hatch?

THE COURT: What is the basis of your objection?

MR. KAIN: I object on the grounds, one: it is irrelevant; and two: not a proper question for this witness.

THE COURT: I will overrule two. It's relevancy is slight. It may be an introductory question or something.

Is that proper procedure, that the cleaners should work not on the same level but inthe same hatch with longshoremen who are unloading the ship?

THE WITNESS: Yes.

Q Even if there is an empty hatch to be cleaned where there is no longshoremen at the same time?

MR. KAIN: I object. There is no testimony in this case that there was an empty hatch.

THE COURT: He didn't say that there were any cleaners working in hatch number 3.

Were there any cleaners working in hatch number 3?

THE WITNESS: They was working the whole ship. but I don't know at what time.

Q Was part of the ship where the cleaners were to clean this passage way that runs from 1 to 6 on the offshore side?

A Yes.

Q And do you know when they worked there?

A No.

Q It was that day?

A Yes.

Q It was perfectly all right for them

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to work there?

A With lights in.

THE COURT: You mean with these cluster lights?

THE WITNESS: Yes.

THE COURT: Lights that were brought in?

THE DEFENDANT: Yes.

Q Do you recall whether these cluster lights that were brought in were ships lights or cleaner's lights?

A Ship's lights.

Q This ship had beams and hatch boards, did it not?

A Yes.

Q Do you know the American expression, King beam and Queen beam?

A Yes.

Q A King beam would have a ledge on which you would fit the hatch board, and the Queen beam is the strong back on that?

A Yes.

Q So the distance between the aft comming say in number 2 deck, and the beam in place would be

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the length of the hatch b oard?

A Between the coaming and hatch, yes.

Q And the Queen beam or strong back would be in the center?

A Yes.

Q So what would the distance be between coaming and Queen beam?

A About 4 feet.

Q Four feet?

A Yes.

Q Wide enough to fall through?

A Yes.

Q Do you remember whether there were any Queen beams there?

A All the beams were in.

Q All beams were in?

A Yes.

Q And they had Queen beams in too?

A Yes.

Q These hatch boards, what dimensions --

MR. KAIN: I am going to ask that the witness be permitted to use the plan.

MR. KLANSKY: I ask for his recollection.

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THE COURT: Give him the exhibit. It might help him.

Read back the question.

(Reporter read as directed.)

THE COURT: Were the hatch boards of uniform length?

THE WITNESS: Yes.

THE THE COURT: All the same size and width?

THE WITNESS: A little different between the different hatches.

Q Did you say there is a difference?

THE COURT: He said about a foot or half a foot.

A In one hatch they are all the same size, but in hatch number 2 and hatch number 1, it can be a little different.

THE COURT: What he is saying is that if you took a single hatch, the boards are all the same size. If you compare two hatches, the boards in one hatch might be a little different in length.

Q If I may pinpoint, it would be the upper tweendeck hatch --

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MR. KAIN: Number 2.

Q How long, how wide, and how thick?

A About 9 feet long --

THE COURT: Nine feet long.

How wide?

THE WITNESS: About one and a half.

Q How thick?

A A little less than two inches.

Q Coming to the number 4 hatch on the main deck, were the covers there the same too?

A Yes.

Q Same dimensions?

A Same as number 2.

Q When these hatch covers are removed, are they done by one man or two?

A Two men.

Q And do they use hooks to remove these hatch boards?

A Sometimes yes, sometimes no.

Q And number 4 main deck was there anything in the hatch covers to stick a hook?

A Yes.

Q Was there any eye, or something of that nature?

A Yes.

Q Where was this located?

A At each one -- at each end of the hatch.

Q Hatch cover?

A Yes.

THE COURT: Hatch board?

THE WITNESS: Yes.

Q Can someone put a hand in that?

A Yes.

Q And lift it?

A Yes.

Q How wide is the ring that would be in this indentation?

THE COURT: Wide enough to have a hand He said wide enough to have a hand -- with gestures.

Q And you have observed that longshoremen took off those covers at number 4 with just their hands?

A Yes.

Q That's the usual method of doing it?

A Yes.

Q Please look at the log and tell us what the weather was that day.

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A It doesn't say.

Q Does it say anything about rain?

A No.

Q Do you recall whether or not it rained that morning?

A It was raining a little, yes. Drizzle.

Q What time, do you recall?

A The longshoremen came on board at 8:15, so it probably stopped then.

MR. KLONSKY: We have the weather report in evidence, and I will ask you whether or not this is substantially correct, as to the amount of rain and the hours of rain.

MR. KAIN: I have an objection to that, your Honor. Those are Weather Bureau reports, I believe from Central Park.

MR. KLONSKY: LaGuardia Airport.

MR. KAIN: I object. This witness, I don't believe is competent to testify.

THE COURT: I will sustain the objection. YOu have the exhibits in evidence, and you have the testimony of

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witnesses.

Q MR. KLONSKY: May I read this?

THE COURT: No, not now. When you sum up I will give you all the time you require.

Generally speaking, there was in the report, some reference to precipitation -- some rain at various times of the day.

Q Do you remember whether a rain tent had been put up at number 4 hatch?

A No rain tent.

Q No rain tent at all?

A No.

Q Was tarpaulin on number 4 hatch, and under the tarpaulin there would be hatch cover and beam?

A Yes.

Q Who had put that tarpaulin on before the longshoreman came?

A The longshore men in Wilmington.

Q You had come from Wilmington, Delaware, coastwise?

A North Carolina.

Q And when you came to the Port of New York

did your men free the booms out of their cradles?

A Yes.

Q Check the winches?

A Yes.

Q You did not actually start longshore operations in New York until the day of the accident, and then you skipped the 4th of July, and went to the 5th of July?

A Yes.

Q What pier did you dock to on the 1st of July, when your ship came in.

A Pier 3, Brooklyn.

Q Will you tell me when the ship left Pier 3, Brooklyn?

A At 1930 -- this is 7:30, on July 3rd, in the evening.

Q On what date?

THE COURT: He said July 3rd in the evening.

Q July 3rd you left?

A Yes.

Q Where did you go to?

A I was told 33 Brooklyn, but I don't know. I wasn't there any longer.

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Q You were told what, sir?

A I was told Pier Number 33, Brooklyn.

THE COURT: In other words, you didn't get the instructions. Somebody told you that it went there. YOu went on vacation.

THE WITNESS: Yes.

THE COURT: You testified to that?

THE WITNESS: Yes.

Q When the ship left Pier 3 that night for another pier did the hatch boards and beams go into tween decks and number 2?

THE COURT: Now, the question isn't clear, but this witness I believe testified that he left -- what was it about 6:00 o'clock to go on vacation?

THE WITNESS: Between 3:00 and 3:30

THE COURT: And the boat was still at Pier 3?

THE WITNESS: Yes.

Q But that night when it left Pier 3, where did it go?

MR. KAIN: I believe the witness has testified.

THE COURT: He may be able to get it from the log.

Does the log show it?

THE WITNESS: It says Pier 33.

Q Is that in Brooklyn?

A I don't know where Pier 33 is.

THE COURT: He says he doesn't know.

Q At the time you told the cleaners to leave these hatch covers off on the tween decks of number 2, did you know that before loading again you would go to another pier?

A We knew we was going to another pier, but not where.

Q While on board as Chief Officer, before you left on vacation, did you conduct an inspection of what cleaning had been done by the cleaners that day?

A That was done by the 1st and 2nd mates.

THE COURT: You are not the First Mate?

THE WITNESS: I am the Chief Officer

THE COURT: You were referred to earlier as the Chief Mate, I believe.

Q When there was an inspection made of

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the number 2 upper tween deck area by an officer of your ship, did the log show who did it, and at what time?

A No.

Q Would it be general practice for it to be done right after the cleaners leave?

A Leave what?

Q Who will leave the hold.

THE COURT: You have got a whole ship there.

MR.KIONSKY: I am talking about number 2.

A They do it just before they are leaving the ship.

THE COURT: In other words, after they have done all their work.

Q There is no reference in the log as to who inspected what area, and when, is there?

THE COURT: We are talking about cleaners?

MR. KIONSKY: Yes.

A It says after the cleaners left, it was inspected by the new charterer.

Q New charterer?

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Rogelberg - cross

A Yes.

THE COURT: What time?

THE WITNESS: That's at 1900 -- 7:00 o'clock.

THE COURT: At night?

THE WITNESS: Yes.

THE COURT: That's about 6 hours after the accident.

Q Before the charterer would inspect, would not an officer of the ship also inspect?

A Yes.

Q YOu wanted to turn a ship over to the new charterer clean?

A Yes.

Q Was there any indication of when that wss done by the ship's officer?

A No.

Q Do you have any recollection as to how many men were cleaning in the number 2 hatch that afternoon and morning?

A No.

Q Did you know a Captain Hazeltine?

A Yes.

Q Was he serving with Rederi?

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A Yes.

Q That was the time charterer whose charter had expired that day?

A Yes.

Q Did he conduct any inspections to see that his cargo inspection condition was properly discharged?

A I don't understand the question.

Q Did you see Capt. Hazeltine on the ship any time that morning or afternoon?

A He was around always, yes.

THE COURT: Did you see him on the ship is the question.

THE WITNESS: I don't remember if he was on the ship.

THE COURT: Is he the port captain?

THE WITNESS: Yes, one of them. He is employed by Grand Colombiana. That's the one who had leased the ship, the one to whom the ship had been chartered.

Q Time charterer, is that right?

A Yes.

Q Is it your best recollection that he was or was not on the ship that day?

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A I can't say.

Q Is it possible with regard to his duties as port capain for the time charterer to check --

MR. KAIN: I have an objection.

THE COURT: Just a minute.

Q (continued) -- to check the removal of cargo that was within his charter?

MR. KAIN: I object, your Honor, unless the witness knows Captain Hazeltine.

THE COURT: Read the question back.

(The reporter read as directed.)

A I don't know what Captain Hazeltine should do. I don't know his instructions.

THE COURT: He said he didn't know what his duties were.

Q Is it usual and frequent, that the time charter's officers when you are under a charter and he has cargo that belongs to his charterer will check to see that it's taken over?

MR. KAIN: I object, your Honor. The witness has said he didn't know.

THE COURT: Maybe with some more questioning his memory may be jogged. Read the last question.

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(The reporter read as directed.)

THE COURT: We will take a recess until quarter to 2:00, and heed the admonition that I have already given you.

(Jury leaves the courtroom.)

THE COURT: Mr. Klonsky, how long do you think you will be with this witness?

MR. KLONSKY: Maybe 15 minutes.

THE COURT: Are there any other witnesses?

MR. KAIN: I expect we will have a medical witness, and also an expert witness.

THE COURT: Mr. Cohen, do you have any witnesses?

MR. COHEN: I may not, after he is done.

THE COURT: Mr. Wolf, I take it none?

MR. KLONSKY: I may have a rebuttal witness on medical findings on what is shown.

THE COURT: Do you expect to recall your complainant for any purpose?

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MR. KIONSKY: I would like to do that.

THE COURT: We seem to have a full budget of testimony for the balance of the day, and if we have any extra time before 4:30, I will take up the requests to charge at that time.

All right. Quarter to 2:00.

This is to certify that the foregoing is an accurate transcription of my stenographic notes in the above entitled matter.

Charlotte Cohen

Charlotte Cohen, CSR
Court Reporter

1386-342

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------X

JOSEPH RODRIGUEZ,

Plaintiff,

-against-

68-C-409

OLAF PETERSON REDERI, AMERICAN STEVEDORES, A.M. CHRISTOPHER CO.,

Defendants.

----------X

United States Courthouse
Brooklyn, New York

February 24, 1972
2:00 o'clock P.M.

B e f o r e:

HONORABLE GEROGE ROSLING, U.S.D.J.

HENRY SHAPIRO
Acting Official Court Reporter

AFTERNOON SESSION

MR. KLONSKY. May we put the diagram up on the blackboard?

THE COURT: Yes.

I will even let you move the blackboard to where the jury can see it.

Bring the jury in.

(The Jury present in the jury box.)

THE COURT: Good afternoon.

MR. KLONSKY: Is there any reference to the last question and answer?

THE COURT: The reporter has changed his appearance.

MR. KLONSKY: He has been to Denmark, Your Honor.

THE COURT: The last one that I recall was that the captain knew that they were going to another pier on July 3rd. I think you had a few questions after that.

CROSS EXAMINATION (Cont'd.)

BY MR. KLONSKY:

Q May I ask you this, sir: When the number 2 main deck was covered by the cleaners, did they put the canvass over that?

A Yes.

Q Now, with the canvass on No. 2 and the hatch boards and beams in place at No. 2, could anybody get into the No. 2 hold by means of the main deck?

A Yes, they could. Just remove the canvass.

Q By removal of the canvass and hatch boards?

THE COURT: They would have to remove all the canvass?

THE WITNESS: No, just a piece in the corner.

Q There was no other means of access except through an open portion of the No.2 main deck hatch; right?

A Yes, sir.

Q And you had been in this area between No. 3 and No. 2 with a light on many occasions before this accident happened?

A Yes.

Q And when people -- longshoremen are working in Hatch No. 2 or 3, or 4, you have seen them walk through this area when it was clear, haven't you?

A If they had been working in the two hatches, yes.

Q In other words, if they had been working in

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No. 2 and No. 4, you have seen them walk through?

A From No. 3.

Q From No. 3?

A Yes.

Q When there is no cargo there it is like an open passageway?

A Yes.

THE COURT: The question that is being put to you is this: Would the longshoremen, if they were in, let us say hatch No. 1, and wanted to get to hatch No. 2, would they climb all the way up to the deck, walk across the deck and go down through the other hatch or would they under your observations have on occasion walked through one of these decks -- not decks, spaces like a shelter deck or the lower hold all the way across?

MR. KAIN: If Your Honor pleases, there is a missing element. There is no reference to lighting.

THE COURT: I didn't say anything about light. That can come out through someone's questioning, nor am I opening any new subject. I am trying to get the thing clear for the jury

by repeating in slightly different form the question that has already been put.

In other words, they wouldn't have to go up to the main deck, walk across the main deck to the other hatch and go down. Sometimes they would use the space below deck to go from one hatch to the other, would they not?

THE WITNESS: If the two hatches were open, yes.

MR. COHEN: I didn't hear.

THE COURT: "If the two hatches were open."

I asked about any two hatches, although I did ask about 2 and 3.

Q Did you or anyone to your knowledge ever tell the longshoremen on July 3, 1967 that they could not walk through there to get to No.2?

A No.

Q Now, sir, looking at the plan here for the second deck, which is the shelter deck in reference to the starboard side, which is the offshore side. From the forward part of No. 4 to the aft part of No. 2, how many doors were there?

A Two.

Q Two doors?

A Yes.

Q I said from the aft part of No. 4.

THE COURT: From all the way back.

Q (Cont'g.) From the forward part of No. 4.

THE COURT: Which is it?

Q (Cont'g.) From the forward part of No. 4 to the aft part of No. 2, how many doors?

A Two.

Q Two.

Where would the first one be?

A In the forward part of No. 4.

Q Where would the other one be?

A In the aft part of No. 3.

Q Isn't it -- I withdraw that.

Was the aft part of No. 3 door locked or unlocked on this date?

A Unlocked.

Q Was it open?

A No.

Q Was it ajar, if you know?

THE COURT: Do you know what ajar means, partly open?

THE WITNESS: I couldn't say. I don't

know.

THE COURT: Was it a double door or a single door?

THE WITNESS: Double door.

THE COURT: The same as No. 4 door?

THE WITNESS: Yes.

Q How high is the ledge to that door? Did you say about an inch and a half?

A About an inch and a half off the floor, like the coaming runs --

Q Like a threshold on the ordinary house floor?

A Yes.

Q Do I understand from you that when you got to the area of No. 2, there is no door there, you just walk in?

A Yes.

THE COURT: From 3 to 2 you walk right in?

THE WITNESS: Yes.

Q There was no cargo in the area before he got to No. 2, was there?

A No.

Q When you get here on the edge where the refre box is, where is the ladder (indicating)?

A It is across the hatch on the other side.

Q It is not in the center?

A No.

Q Do we have a picture on this?

A Yes.

THE COURT: What ladder is in the center of which hatch?

THE WITNESS: It's the ladder in the center of the No. 2 in the forward end.

THE COURT: In the forward end of hatch No. 2, in the center is a ladder leading from where to where?

THE WITNESS: From the upper tween deck to the main deck.

THE COURT: That is one story up to the main deck?

THE WITNESS: Yes.

Q I show you Defendant's Exhibit H. I think it is Exhibit I where you put the word "refre door."

A Yes.

Q I see on the right side of this picture a ladder depicted.

A Yes.

THE COURT: That does not mean anything for the record. Does the same ladder appear in

both exhibits?

THE WITNESS: Yes.

THE COURT: H and I?

THE WITNESS: Yes.

THE COURT: Are they H and I?

MR. KLONSKY: Yes, Your Honor.

Q Where is the turning point in this picture to come into --

THE COURT: That is not too helpful. The jury is supposed to get evidence. Go back to your tation.

MR. KLONSKY: Could we have the red pencil?

THE COURT: If we have to mark it. Maybe we do not.

Q I would like you to mark where you would turn to the left as shown in that photograph.

THE COURT: Do you know what he said? Read it back.

(Question read.)

MR. KLONSKY: By that I mean --

THE COURT: Just a moment. First of all the photograph that the witness was looking at was Exhibit H. Will you stand in front of

the jury and walk slowly in front of them so they can see which photograph it is.

(Photograph exhibited by the Clerk.)

THE COURT: The next question the lawyer asked you is this: Is any part of the refre box shown in this photograph, Exhibit H, which was just shown to the jury?

THE WITNESS: Yes.

THE COURT: Where would the reefer be?

THE WITNESS: Just behind the officer standing there.

THE COURT: On the right-hand side of the picture?

THE WITNESS: Yes.

THE COURT: You say the officer. The witness indicates that the refre box is behind the officer on the right-hand side.

Now, as you look into the picture, in which direction are you looking?

THE WITNESS: You are looking into the starboard side of the ship.

THE COURT: The starboard side from the port side?

THE WITNESS: Yes.

THE COURT: Now, this is the last part of the question. Show the corner of the refre box and around the corner or in any part of the picture is the front door of the refre shown?

THE WITNESS: Yes.

Q Which part is shown in the picture -- which part of the reefer box?

A Shows the forward part.

THE COURT: The front part of the reefer?

THE WITNESS: Yes.

THE COURT: All right.

MR. KLONSKY: With the Court's permission --

THE COURT: And the starboard passageway would be indicated where?

THE WITNESS: It is around that and down that way (indicating).

THE COURT: Indicating right across the picture, in back of the officer who is shown there?

THE WITNESS: Yes.

THE COURT: So the corner now that you are asked about of the refre would be

where, if someone were coming up the passageway and turning to the left around the refre?

THE WITNESS: He is coming from here, turning around here (indicating).

THE COURT: In other words, he would come from the right side of the picture in back of the man and forward to where the man is standing to get around the corner of the reefer?

THE WITNESS: Yes.

THE COURT: Do you want to see the picture again close to understand the relationship?

(Photograph shown to jury.)

MR. KLONSKY: We have it marked where the starboard passageway is?

THE COURT: He has testified. The jury just saw the picture.

Q Now, the distance from that point where you start your turn from the starboard passageway, to this lady would be how far?

MR. COHEN: Is this to the forward or aft ladder?

MR. KLONSKY: The ladder in front of the refre.

MR. COHEN: The record does not show which ladder he is referring to.

THE COURT: Yes, it does a little earlier. Which ladder is that?

THE WITNESS: That is the ladder in the aft part of No. 2 tween deck on the port side.

THE COURT: Running from where to where?

THE WITNESS: From upper tween deck to upper deck.

THE COURT: All right.

Q What is the difference from the point where you start this turn to this ladder?

THE COURT: Make it along the floor.

A Twenty-nine to thirty feet.

Q Does this ladder show on the diagram?

A Yes. I haven't marked it.

Q Would it show without your marking?

A No.

Q And you say at No. 4 there was a ladder too from the lower hold up to the tween deck?

A Yes.

Q And then at the forward end of the tween of No. 4 there would be two ladders; is that true?

A Yes

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Q You would have, as I understand from your testimony, an aft ladder at No. 4 going down to the lower hold --

A Yes.

Q -- and you would have to go more forward to get to anotherladder going to the main deck?

A No, there is one in the aft part and one in the forward.

Q Do they show in this diagram?

A No.

Q These ladders were wood, were they?

A Steel.

Q A permanent part of the ship?

A Yes.

Q Now, have you seen hi-los operated in hatches?

A Hi-los, is that the fork lift?

THE COURT: Yes.

Q It's frequent for hi-los to be moving a cargo in hatches as well as on the piers?

A Yes.

Q When a man goes to operate a hi-lo on the ship, he doesn't go down with the hi-lo. He has to climb down himself?

A Yes.

Q It's only when it gets down to the deck by means of the boom and the winches that the men take over to operate it; is that true?

A Yes.

Q Captain, did you give a statement in this case -- did you give anyone a statement in this case?

THE COURT: Did you write out anything and give it to someone telling what happened in this case?

A No.

Q Did you sign your name to a paper that someone else wrote out?

A No.

Q Did you write a letter on this case to anyone?

A No.

Q Now, Berdleson who was the mate that went down, do you know where he is now?

A I believe he is on a Norwegan ship.

THE COURT: On the high seas?

THE WITNESS: Yes.

Q Do you know when he was last employed by your company?

A I don't know when he was paid off the Sunny Prince, but that was the last.

THE COURT: When you say, "When he was paid off," you mean collected his pay?

THE WITNESS: Yes.

Q Who was the Captain of the Sunny Prince at the time of the accident?

A Long Estrom.

Q Is he still working for the same company?

A No.

Q Do you know when he left?

A I'm not quite sure.

Q You are not quite sure?

A No.

Q Now, as cargo officer are you familiar with the use of a frozen locker for cargo and the effect upon the cargo when it is exposed to warm weather?

A Yes.

Q Now, this shrimp came out of a freezer; did it not?

A Yes.

Q What was the temperature in the freezer?

A It says in the log book, I believe, it was 14-1/2 degrees, minus centigrade.

THE COURT: What was it?

THE WITNESS: 14-1/2.

THE COURT: Centigrade?

THE WITNESS: Yes.

MR. KAIN: The witness said it shows in the log book. May he see the log book?

THE COURT: Yes, hand the book to the witness.

MR. KLONSKY: I think it shows in the plan also.

THE COURT: Let us get the log book.

THE WITNESS: It says 9-1/2. That is 14 degrees fahrenheit.

THE COURT: Minus 9-1/2 degrees?

THE WITNESS: Compares to 14 degrees fahrenheit.

THE COURT: In other words, zero centigrade would be 32 degrees fahrenheit?

THE WITNESS: Yes.

Q Now, this cargo coming out of a freezer of that nature, how long would it have to be exposed to the temperature of about 76 to78 degrees before it gets spoiled?

MR. KAIN: If Your Honor pleases --

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THE COURT: Yes.

MR. KAIN: -- unless the witness testifies that he is an expert, I object to it.

THE COURT: He can give the best answer he can. Maybe he knows, maybe he doesn't.

THE WITNESS: I don't know.

THE COURT: Read the question back.

MR. KLONSKY: He said he doesn't know.

THE COURT: I do not know what he doesn't kno

(Question read.)

Q Does the log show when the gang at No. 4 hatch concluded their discharge of the hides?

A Yes.

Q What time?

A At 1514. That is 3:40 in the afternoon.

Q Does it show when they left the ship then or stayed on?

A Moved to hatch No. 6.

Q The same gang?

A Yes.

Q When they went to hatch No. 6, what time did they conclude their time there?

A 1714, which is 5:40.

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Q That is the same gang that Mr. Rodriguez was a member of?

A Yes.

Q Moving from 2 to 4 to 6?

A Yes.

MR. KLONSKY: Thank you.

THE COURT: Any redirect?

MR. KAIN: I have one or two questions.

REDIRECT EXAMINATION

BY MR. KAIN:

Q Captain Rogeberg, on July 3, 1967, on the Sunny Prince was there any deck cargo or any obstructions on the main deck of this vessel -- that's the upper deck --

THE COURT: The deck that is exposed to the sky.

Q (Cont'g.) -- that would prevent a person from walking from No. 4 hatch to this weather deck -- this main deck forward to No. 2 hatch?

A No.

Q Did you, at any time, after the ship cleaners had closed No. 2 hatch, receive a request to have it opened up or to open it up?

A No.

Q Did you, at any time, after the ship cleaners had closed the No. 2 hatch, at the main deck level, receive a request for any lights for use in the No. 2 hatch?

A No.

Q Did anybody ask you at any time that day whether they could walk through on the second deck or tween deck, the shelter deck from No. 4 to No. 2?

A No.

Q Now, Captain, on July 3, 1967, were there any cargo at any time that day discharged from the No. 3 hatch?

A No.

Q Was that hatch worked at all by longshoremen?

A No.

Q How about this cargo space forward of No. 4, next to the motor casing? Was there any cargo discharged that day from those spaces?

A No.

Q Were there any longshoremen working in those spaces?

A No.

Q Was there any cargo, when this ship came into the Port of New York, in No. 2 hatch other than

17-1/2 tons of shrimp, I think, you said it was?

A No, nothing else.

Q That was the only cargo in No. 2?

A Yes.

Q All of this cargo was contained in this refre box; is that correct?

A Yes.

Q Now, Captain, you testified this morning -- possibly yesterday -- as to the size of these cartons of shrimp. You said they were a little more than a foot in each direction, cube?

A Yes.

Q And, I believe, you said that they weighed 50 pounds; is that correct?

A Yes.

Q Were these cartons subdivided into smaller packages inside the cartons?

A Yes, it was ten smaller cartons inside.

Q Ten?

A Yes.

Q Were they of five pounds each?

A Yes.

MR. KAIN: No further questions.

THE COURT: Mr. Cohen?

MR. COHEN: No questions.

THE COURT: Mr. Wolf?

MR. WOLF: None.

THE COURT: Any recross?

MR. KLONSKY: Yes.

THE COURT: Limit yourself to what was brought out on redirect.

MR. KLONSKY: Yes.

RECROSS-EXAMINATION

BY MR. KLONSKY:

Q With respect to the tarpaulin on No. 4 hatch, was this battened down with any bands?

Do you know what I mean by "battened down"?

MR. KAIN: If Your Honor pleases, there is no redirect on No. 4 hatch tarpaulin.

MR. KLONSKY: I think he did --

THE COURT: He said a tarpaulin was put on hatch No. 2. I think he testified that there was no tarpaulin at all on hatch No. 4. Am I correct about that?

MR. KAIN: I didn't refer to that in my questions.

Q As to hatch No. 2, after the canvass was put on, was there batten bands put on too?

A Just (indicating).

Q The batten bands were lined on?

A Yes.

Q Were they tightened?

THE COURT: The weight of those metal bands was sufficient to hold the tarpaulin down?

THE WITNESS: From blowing off, yes.

THE COURT: No storm was coming?

THE WITNESS: No.

Q Now, sir, during the cargo operation, there is a hook and a draft that would go in and but of hatches?

A Yes.

Q And when there is activity of that nature, of cargo to be discharged, is it good practice for longshoremen to climb the ladder to get out to the main deck?

MR. KAIN: This is improper recross.

MR. KLONSKY: I believe there was something --

THE COURT: Read the question back, please.

(Question read.)

THE COURT: I will permit that, because the opposing theories, by this time in the case, are pretty sharply defined. The plaintiff's

position on his direct case supporting earlier testimony was that a possible area for passage from 2 to 4 was below deck and you on your redirect elicited from the captain the response that the deck was clear. That is the main deck -- the weather deck was clear implying thereby and you will probably have something to say about it during summation, that that was the path that should have been taken over the surface of the main deck up from the hold, over and across the surface, lift up the tarpaulin at one corner and then go down.

Now, the recross is attempting to establish that that is an unsafe path while cargo activities are in progress.

Do I have your point correctly?

MR. KLONSKY: Yes.

THE COURT: I will overrule the objection.

MR. KAIN: May I note, Your Honor, that this witness has not been qualified as an expert on stevedoring practices.

THE COURT: Even I could be qualified, if I sat on shipboard and watched everything moving overhead as to whether it is or is not a safe procedure to walk under the booms.

MR. KAIN: If Your Honor pleases, the witness was asked about the ladder in the hatch and not walking along the deck.

THE COURT: No, I do not believe that is the question.

Read the question back. Maybe I misunderstood it.

(Question read.)

THE COURT: Climbing the ladder would be to climb under an open hatch and I assume that is preliminary to the next question of a similar nature. I will overrule the objection.

Q Do you understand that question?

A No, he should have stayed down in the hatch.

THE COURT: Until what happened?

THE WITNESS: Until they stopped discharging.

THE COURT: Would he have to stay in the hatch if he used the passageway under the deck?

THE WITNESS: You would have to climb

from the lower hold --

THE COURT: If he is on one level and he wants to go from one hatch to another hatch, would they have to stop the unloading of the first hatch if all he is going to do is walk through a passageway underneath the deck?

THE WITNESS: No, I would say so. It's more safe.

Q It's more safe to walk through the shelter deck passageway?

A No, to stop the discharging.

Q This ladder is in the square of the hatch; is it not?

A Yes.

Q No. 4, this is the square of the hatch?

A Yes.

MR. KAIN: May we fix which ladder?

MR. KLONSKY: I said No. 4.

THE COURT: Any ladder, I assume, is referring to a hatch that is being worked with a winch and boom.

Q Did practice require longshoremen to stay in the wing away from the square when cargo activity is going on?

A Yes.

THE COURT: Wait a second. What could sometimes happen if he did not do that, go into the wing until the cargo is lifted up and over?

THE WITNESS: Some of the cargo could fall off and hit him.

THE COURT: Could it fall out of the sling that is being hoisted up and hit him?

THE WITNESS: Yes.

Q If he takes this shelter deck passageway, would he be exposed to any falling cargo?

MR. KAIN: If Your Honor pleases, I object.

THE COURT: I will sustain the objection. Tell the jury about it in summation.

MR. KLONSKY: I have no further questions.

THE COURT: Step down. Call your next witness, please.

MR. KAIN: Yes, Your Honor.

(Dr. Jacob D. Matis was duly sworn and testified.)

MR. KLONSKY: We may require a voir dire as to this witness with respect to whether he should testify.

THE COURT: After we hear what his qualifications are, if you wish to contest

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his qualifications, you will be given a voir dire.

W I L L I A M W H E E L E R, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: State your full name for the record.

THE WITNESS: William Wheeler, W-h-e-e-l-e-r.

THE CLERK: Your address?

THE WITNESS: 1061 Esplanade, Pelham, New York.

MR. KLONSKY: Your Honor, may I respectfully at this time bring to the Court's attention that from the beginning of the trial there was an admonition --

THE COURT: Do you want a side bar?

MR. KLONSKY: Yes, Your Honor.

(The following transpired at the side bar.)

MR. KLONSKY: At the beginning of the trial you admonished us to keep all witnesses out of the courtroom and he was here.

THE COURT: Throughout?

MR. KLONSKY: Yes.

THE COURT: Why didn't you call it to my attention?

MR. KLONSKY: I didn't know he was going to testify. I thought he was to give advice.

THE COURT: You may cross-question this witness as to whether he has listened to everything.

MR. KLONSKY: I know he has.

THE COURT: And whether he is aware of the fact that all witnesses were excluded.

MR. KAIN: If Your Honor pleases, this concerns me because I feel it was a reflection on me. I asked to have the fact witnesses excluded. There was nothing said about expert witnesses. This man is not a fact witness.

THE COURT: We will hear what he testifies to. You people place too heavy a burden on the Court. I am not clairvoyant.

MR. KAIN: Mr. Klonsky knows him.

THE COURT: I do not want you to think that I am over facetious, but my audience is so thin normally that when I see an extra

person present I rejoice. I do not look on him as a witness.

MR. KAIN: I understand that, Your Honor.

The Court's direction had only to do with fact witnesses.

THE COURT: This is probably sensing or jogging. If it turns out that he was right down there in that hold when your man came through looking for the shrimp, then he is a fact witness. But if he is going to testify what the general practice is in some area and he gets by a few obstacles, like your objections, he won't be a fact witness.

However, if it appears that he has benefited by what he has heard from the witnesses, I will take it under advisement. It is hard to see how. Note your objection or exception. I do not know what I am supposed to do to remedy your situation. I am not going to exclude him.

Do you want me to fine him for contempt?

MR. KLONSKY: The major ground of the objection would be that this testimony

belongs to the jury and he should not --

THE COURT: You have a point there, but I do not rule on objections until they are made and until I hear what they are addressed to and sometimes testimony comes in on one ground which has its effect in another area and probably intentionally and the objection does not result in its exclusion, it just affects the admonition to the jury to limit the effect of the testimony.

MR. KAIN: May I note on the record that Mr. Klonsky obtained from the ship's chief officer proper stevedoring practices.

THE COURT: I heard that too.

MR. KLONSKY: I do not know what that has to do with this expert.

(The following transpired in open court.)

DIRECT EXAMINATION

BY MR. KAIN:

Q Captain, what is your present employment?

A Presently self-employed as a marine surveyor, marine consultant.

Q Would you tell His Honor and the ladies and gentlemen of the jury your background in the marine

field?

A Yes.

In 1935 after graduating high school I was employed as an ordinary seaman, a deck hand aboard oceangoing vessels. In 1936 I came ashore and I worked as a rigger. In 1939 I was enrolled in the United States Maritime Commission Cadet Training Program and I was graduated from that course of training as a third officer. I served as a third officer aboard American Flag freight ships for about 18 months, a year and a half. That qualified me to sit for a second mate's examination. I obtained my second mate's license. I sailed as a second mate for about a year on freight ships. That qualified me to sit for my chief mate's examination. I passed that examination, sailed as a chief mate for 18 months, a year and a half. That qualified me to sit for my master's license which I passed in 1945. I sailed as a master of American Flag Ships from 1945 to 1948 when I reverted back to chief mate again. 1950, 1951, I was called to active duty in Korea.

In 1952 I came back as a chief mate on merchant ships. At the end of 1952 I came ashore and worked as a stevedoring superintendent until 1955 when I went back to sea briefly for six months as master.

Since the end of 1955 I have been presently employed, up until the present time, as a marine surveyor.

Q How long were you a stevedoring superintendent?

A About three years.

Q Was that here in the Port of New York?

A Principally here in the Port and very briefly, about two months, I was sent down to Baltimore.

MR. KAIN: May I have a moment?

THE COURT: Yes.

(Pause.)

Q Captain, have you seen the plan of the Sunny Prince which is here, Plaintiff's Exhibit 3 in evidence?

A Yes; I have seen it.

Q Is that ship a shelter deck type ship?

A Yes, she's a shelter deck type ship.

Q Would you tell me, Captain, what is a shelter deck type ship?

A A shelter deck type ship is a vessel that is constructed in a particular manner. The bulkhead decks end at the main structural deck, not the weather deck, one deck below the main deck.

Q Would youtell us what you mean by bulkheads?

A Transverse watertight divisions between the various

compartments of the ship. We have one, two, three forward of the bridge, the engine room, four, five, and six aft of the engine room, plus the four feet tank up in the forward end which is behind the collision bulkhead and the aft tank at the stern which is divided by watertight bulkheads.

Q Will you tell me, Captain, based on your experience as a seaman and as a stevedoring superintendent, is there a custom and practice in the Port of New York and in other ports in which you have worked in the Continental United States with respect to the covering of the main deck or weather deck hatches and intermediate hatch levels when cargo handling, that is, either loading or discharging has been terminated for the day but is to resume in the same hatch the next day or within the next two days?

A Yes; there is.

MR. KLONSKY: Objection, Your Honor.

THE COURT: Overruled.

Q Would you tell me, Captain, what that custom and practice is?

MR. KLONSKY: Objection, Your Honor.

THE COURT: Overruled.

A It is customary to take measures to protect the cargo or intercargo compartments of the ship by either

covering the weather deck, spreading tarpaulins over it or rig a canvass tent that protects the interior area of the hatch.

Q Will you tell me, Captain, what is meant by a "night tent"?

A A night tent is a canvass tent that is suspended -- that is suspended from one of the cargo booms over the hatch opening and the skirt of the tent is stretched around the hatch coaming and tied down so if it does rain, the water runs down the side of the canvass and down to the deck.

MR. KLONSKY: I object on the grounds of materiality. We are not concerned with rain or night tents here.

THE COURT: Overruled.

Q In what respect does a night tent, Captain, differ from a rain tent, if it does?

A A rain tent is a tent which has three sides. One side is open, so you can work the cargo through the opening --

THE COURT: Have you described the entire custom?

THE WITNESS: The custom is to cover the hatch.

THE COURT: What else?

THE WITNESS: To protect the cargo that might be in the hatch and also protect the internal pa ts of the ship by covering the hatches.

THE COURT: The main deck?

THE WITNESS: Yes.

THE COURT: Suppose the hatch underneath has been worked and left closed -- in other words, it has been closed -- the upper tween deck, for example -- and no more longshoreing work is to be done below, is it part of the custom that they remove the cover?

THE WITNESS: No, but --

THE COURT: Never mind the but.

THE WITNESS: No.

THE COURT: They leave things as they are?

THE WITNESS: Whoever leaves the hatch last, covers the top deck.

THE COURT: That is all?

THE WITNESS: To protect the cargo or the contents from the elements.

THE COURT: Is it part of the custom, if longshoremen have finished working in a lower deck and have covered that deck, that

whoever puts this tent on or covers the main deck removes the lower deck?

THE WITNESS: They might.

THE COURT: For what purpose?

THE WITNESS: The ship -- the compartments are accessible for Coast Guard inspection and there might be a fumagation or --

THE COURT: There might be a number of reasons?

THE WITNESS: Yes.

THE COURT: In some instances the tween deck would be left covered --

THE WITNESS: If the work is going to continue. If the ship is going out on the ocean, then if you left those hatch covers on the wing of the deck, the hatch covers would fall down the opening and be damaged. This is the reason you cover it when you go to sea, but when you are in port you leave it open.

THE COURT: You are testifying with respect to a custom as to the main deck, but the lower decks are sometimes left covered and sometimes not left covered?

THE WITNESS: Which is most convenient.

THE COURT: If they are left uncovered, are they permitted to be accessible for people to walk in that area who have a right to be walking in that area without warning?

THE WITNESS: If the hatch is covered, it's dark and people are told and trained not to enter dark compartments. For this reason --

THE COURT: What kind of people?

THE WITNESS: All people that are accustomed to work aboard ships.

THE COURT: Like longshoremen?

THE WITNESS: One of the standing orders is not to enter dark compartments.

THE COURT: Longshoremen?

THE WITNESS: Yes, cleaners --

THE COURT: Don't enter dark compartments?

THE WITNESS: Yes.

MR. KLONSKY: I ask that this testimony be stricken.

THE COURT: No, I will see what the custom is.

MR. KLONSKY: What he just testified

about what people were told --

THE COURT: No, I will allow it.

Q Captain, assuming cargo has been completely discharged from a ship's hatch and the cleaning of the hatch has then been completed and that the intermediate deck levels have not been removed following the cleaning, but that the hatch is closedon the main deck -- the weather deck level -- with the hatch beams in place and the hatch boards on and tarpaulin over them, is there a custom and practice with respect to -- that's in the Port of New York -- with respect to whether the intermediate deck levels, the upper tween deck and the lower tween deck -- whether any of these intermediate levels be removed?

A There is such a custom.

Q What is the custom?

MR. KLONSKY: Objection.

THE COURT: Overruled.

A That when the weather deck is covered this protects the compartments from the elements. If we have knowledge that the work is going to go on -- to resume in a certain area, then you might take preparatory steps to cover or if you know it is going -- that is if you know that the work is going on down below, you would not cover. It would depend on your knowledge of how much in advance

you know what the work will be.

Q In your opinion, Captain, based upon your experience as a seaman, ship's officer and a stevedoring superintendent, is it good stevedoring practice to permit a longshoreman to enter a dark compartment or cargo area --

MR. COHEN: Objection.

MR. KLONSKY: Objection.

THE COURT: I think I will sustain the objection. It is a jury question as to what is good or not good practice. That is the equivalent of asking this witness to testify whether it is or is not an unseaworthy condition or negligent condition. That is for the jury to say.

Q In your opinion, Captain, based on your experience -- I withdraw the question for the moment.

Captain, in your opinion based on your experience is a flashlight of the same condition as this, a half inch to an inch longer, and slightly bigger around, adequate light for use in entering ship's cargo spaces which have been battened down?

MR. KLONSKY: Objection.

THE COURT: Sustained. I will permit you to ask the witness how far the light

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can be thrown by such a pocket light or flashlight, and let the jury decide whether that is adequate light under the circumstances.

MR. KLONSKY: I object on the further ground he is not qualified as an electrical engineer.

THE COURT: He may know something about flashlights.

I use them.

Q Captain, in your opinion, based on your experience, is it proper to leave hatches which have been battened down on the main deck level and which are not being worked lighted?

A Yes, I have an opinion.

Q Would you tell me what it is?

A Yes, it is improper to leave the illumination -- the lights on, because when the lights are on the circuits -- the wiring is energized and if there has been any damage or if there happens to be damage you could have a fire. You do not leave lights on in compartments not being used.

Q Is that practice aboard ship to extinguish the illumination -- the turning off of lights when leaving the hatches that are not being worked?

A Yes.

Q Is that true, Captain, whether the hatch has been completely battened down at all levels?

A No; if it is covered and is inaccessible to people and no one is working in the area, you don't leave the lights on. In fact, it's very dangerous practice to leave them on because of the fire hazard.

Q Do youturn off the lights --

THE COURT: Counsel, the testimony here seems to be onesided, without contest by the other that there were no fixed lights in any of these areas that are here involved, that the lights had to be brought.

MR. KAIN: Correct.

THE COURT: Whether they were cluster lights or flashlights. You could inquire as to the usability or usefulness of that type of light. Do not go beyond the record here.

Q Is it proper, Captain, based on your opinions to leave a lighted cluster light or portable light in a hatch which is not being worked?

A It is improper to leave that light turned on.

Q Incidentally, Captain, could you tell me what is meant by cluster?

A It's a light consisting of reflectors, usually

circular with three, four, or five bulbs in them of about 100 watts each.

Q This type of light is used for what purpose?

A You could hang it to illuminate an area. You hang it on the hatch coaming to illuminate the hold. You could hang it on the mast to illuminate the deck area, or on the side to illuminate the pier.

Q Tell me, Captain, whattype of light is used in working cargo hatches which do not have fixed lighting?

A Cluster lights, portable cluster lights with a long wire. (Indicating.)

Q Captain, based on your experience as a stevedore foreman, is it custom for longshoremen to be furnished with flashlights?

A No, sir.

THE COURT: To be furnished by whom?

THE WITNESS: By anyone. I never seen a longshoreman to my knowledge carry one of his own.

Q Could you tell me, Captain --

MR. KLONSKY: Could that last remark be stricken, as to what he had seen?

THE COURT: Read the last question and answer, please.

(Question and answer read.)

THE COURT: I will strike out the last part, this witness has never seen a longshoreman carry a flashlight. You mean aboard ship?

THE WINTESS: Yes, my observations were restricted to aboard ship under working conditions.

Q Captain, would you tell me, based on your experience, the approximate weight of a hatch board that is approximately 9 feet in length by a foot and a half or 18 inches wide by approximately 2 inches thick?

A A hatch board of this type, made out of wook -- yellow pine is usually used becauee it's so strong -- weighs about 100 pounds. Yellow pine goes about 50 pounds a cubic foot.

Q Did you say 100 pou ds?

A Yellow pine a cubic foot comes out to about 50 pounds.

THE COURT: That would mean a 2 foot hatch board?

THE WITNESS: A cubic foot, a foot ach way.

Q Could you tell me, Captain, is it customary to make a hatch board out of a single piece of wood?

A No, it is not customary.

Q Why is that?

A Because wood is a natural material. You cannot see the inside of the grain of the wood. There might be a flaw in any given piece of wood, so you use two planks -- two, or three, or four to provide the width of the hatch board assemblage.

Q And also to provide that you have different pieces of wood, not the same piece?

A Not the same grain, different planks that are secured together-- banded together so you are not dependant on one grain or the grain of one piece of wood.

MR. KLONSKY: I do not see the materiality here. Objection.

THE COURT: You wait until the answer comes in and you interpose your objection. This time you waited too late.

Q Based on your experience, Captain, is it possible for a longshoreman -- a single longshoreman -- to remove a hatch board without assistance, approximately 9 feet long?

A Yes.

MR. KLONSKY: Objection.

THE COURT: If the fellow was Atlas, who was the strongest man until he died prematurely, I suppose he could lift it himself, but if he is a midget he might need another midget to help him. I will sustain the objection. The question is too vague. You mean someone in the last stages of tuberculosis cannot very well move it no matter how big he is and a fellow in good health with good muscles can.

THE WITNESS: The normal longshoreman can take a hatch board that is in place and simply roll it over and go down a ladder --

MR. KLONSKY: I ask this be stricken, Your Honor.

THE COURT: I will allow it. He is indicating the physical activities of a longshoreman.

What about your testimony a few moments ago that it is not one hatch board that you are dealing with, it is multiple hatch boards?

THE WITNESS: A hatch board is made

of multi-pieces of lumber banded together.

THE COURT: How thick are those pieces?

THE WITNESS: About 2-1/2 inches thick.

THE COURT: Each one is about 3/4's of an inch?

THE WITNESS: I am not clear.

THE COURT: Is the board laminated?

THE WITNESS: Laminated on a horizontal plane, but it is one thickness of wood. To make a 14 inch board you have to use two bonded together.

THE COURT: Yes, and you also said as many as three or four can be banded.

THE WITNESS: Not three or four hatch boards. To make a 14 inch hatch board you would band together three, four --

THE COURT: The Court withdraws its question. I instruct the jury to disregard the Court's question and the response given.

MR. KAIN: I have no further questions of this witness at this time.

THE COURT: We will take a five-minute

recess and then we will continue.

(Recess taken.)

CROSS EXAMINATION

BY MR. KLONSKY:

Q Have you been here each day of the trial?

A I don't know. I came two days last week. I think Wednesday and Thursday and I have been here this week, Monday, Tuesday, and today.

Q Have you been giving advice to the attorney for the ship owner with respect to questions and answers?

A When I was asked about certain technical details, yes.

Q Did you also talk to Captain Rogeberg who testified here?

A Yes.

Q Did you talk to him during lunch while he was undergoing cross-examination?

A I don't know if we discussed the case, but we spoke.

Q Did you talk to him about the case?

A I don't know if we discussed the case. He spoke about his selection of .

THE COURT: You are not expert on that?

THE WITNESS: No.

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THE COURT: Get to something that has to do with this.

Q What are you being paid for your services?

A My time will be billed to Mr, Kain depending on how much time I put in and I have put in a lot of time here.

Q How much a day?

A My usual day or time is billed at $35 an hour, but I can't send him a bill like that for this.

MR. KLONSKY: Thank you, Captain.

THE COURT: You may step down.

Any further witnesses by the defense?

MR. KAIN: I have no further witnesses. I do have interrogatories which I wish to read.

THE COURT: Let me get the interrogatories. That would be the plaintiff's interrogatories?

MR. KAIN: The defendant's interrogatories --

THE COURT: Addressed to the plaintiff.

I have both the interrogatories and the answers.

Members of the Jury, I remind you of what I told you earlier that there are certain procedures which the attorneys on both sides engage in before the trial and that is to put

OPINION OF GEORGE ROSLING U.S.D.J.

ROSLING, J.

On February 26, 1971, the jury rendered a verdict in favor of the plaintiff, Joseph Rodriguez, against Olaf Pedersen Rederi, the defendant shipowner, in the sum of $35,000. In addition to rendering such general verdict it answered written interrogatories submitted to it by the court pursuant to Fed. R. Civ. P. 49(b) in which it found the longshoreman plaintiff contributorily negligent and reported that it had by reason of such contributory negligence reduced the award of damages plaintiff had sustained to the sum announced as its verdict. On March 1st the court submitted to the same jury which had been held over to hear the third party claim by the shipowner against the American Stevedores, Inc., third party defendant,[1/] for indemnity, a further interrogatory asking the jury to report the amount of damages they had found before reduction for contributory negligence. The jury answered that the unreduced damages totalled $80,000.

The court thereupon severed and deferred for later jury trial so much of the shipowner's claim-over as

1/ The crossclaim of the stevedore against the third party codefendant A. M. Kristopher Co., Inc., and the counter cross-complaint by the latter against the stevedore were discontinued in the course of the trial.

sought indemnification for counsel fees and disbursements for defending the primary suit and proceeded to try the issue of the shipowner's claim to indemnification as to the longshoreman's recovery of damages for his injuries. Such issue was submitted to the jury without the introduction of further evidence by either party. Before the submission both these parties moved for directed verdicts which the court denied.

The shipowner now moves under Fed. R. Civ. P. 50 for the following relief:

(1) To renew its motion for a directed verdict on the indemnity claim; and

(2) Judgment, notwithstanding the verdict; or

(3) A new trial of the issues raised by the indemnity claim.

The jury by its finding of substantial contributory negligence on the part of the primary plaintiff imposes a vicarious equal fault on the stevedore employer and forecloses escape from the shipowner's claim that the stevedore's performance was not of the requisite workmanlike quality. Only by a showing that the shipowner by its own affirmative act had thwarted such

performance can the stevedore be absolved of liability.[2/] The jury by its finding of contributory negligence compels the conclusion that it must have determined that Rodriguez's entry into the dark interior passageway with his inadequate flashlight and his proceeding from the exit door of hatch #4 to the uncovered 'tween deck of hatch #2 where he fell constituted such contributory negligence.

Whether the shipowner's negligence and the unseaworthiness of the ship lay in the failure of the ship to post an appropriate warning on the exit door of hatch #4 or its failure to provide lighting in the passageway to hatch #2 or, finally, in failing to keep the 'tween deck of hatch #2 covered even though the longshoremen's unloading of hatch #2 had been completed some hours before the accident is unclear. The critical point, however, with respect to which the ship

2/ *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 567, 78 S. Ct. 438, 441 (1958); *Hartnett v. Reiss Steamship Co.*, 421 F. 2d 1011 (2d Cir. 1970), cert. denied, 400 U.S. 849; *McLaughlin v. Trelleborgs Angfartygs A/B*, 408 F. 2d 1334, 1336 (2d Cir. 1969), cert. denied, 395 U.S. 946 (1969); *Albanese v. N. V. Nederl. Amerik Stoomv. Maats*, 392 F. 2d 763 (2d Cir. 1968), rev. on other grounds, 393 U.S. 72 (1968); *Mortensen v. A/S Glittre*, 348 F. 2d 383 (2d Cir. 1965); *Nicoli v. Den Norske Afrika-Og Australielinie*, 332 F. 2d 651, 655 (2d Cir. 1964); *Misurella v. Isthmian Lines, Inc.*, 328 F. 2d 40 (2d Cir. 1964); *Shenker v. United States*, 322 F. 2d 622 (2d Cir. 1963); *Damanti v. A/S Inger, et al.*, 314 F. 2d 395, 399 (2d Cir. 1963); *Drago v. A/S Inger*, 305 F. 2d 139 (2d Cir. 1962); *H. & H. Ship Service Co. v. Weyerhaeuser*, 382 F. 2d 711 (9th Cir. 1967); *Calmar Steamship Corp. v. Nacirema Operating Co.*, 266 F. 2d 79, 81 (4th Cir. 1959).

might be held by its action or inaction to have thwarted workmanlike performance by the shipowner, is the unbarred 'tween deck exit door of hatch #4, for once beyond this door the longshoreman's contributory negligence came into play as he approached the uncovered hatch in which he was hurt.

Whether the door should have been barred by the shipowner or stevedore against its use in the fashion described and whether, in any event, a warning notice should have been posted or an oral notice given to the longshoremen of the dangers involved in their wandering off into holds other than the one in which they were working is not the decisive question upon which liability will turn. The stevedore for its part had a later opportunity than the ship to bar the door or to give the warning or to do both. Was it sufficiently on notice of the condition so that its failure to act constituted an unworkmanlike performance of its contractual obligation?

The question is a close one and should be presented to a jury in the form of an interrogatory calling for a written answer. Counsel should perhaps provide the jury with factual enlightenment by evidence of the physical situation with focus directed to the door.

OPINION OF GEORGE ROSLING U.S.D.J.

Motions for a directed verdict and for judgment notwithstanding the jury verdict are denied. Motion for a new trial on the issues raised by the indemnity claim is granted.[3/] Case is set down for assignment for trial and fixation of a trial date on October 8, 1971, at 2:15 P.M.

The foregoing decision constitutes the findings of fact, conclusions of law and order of the court.

GEORGE ROSLING
U.S.D.J.

3/ The issues of counsel fee to be awarded to the shipowner and disbursements to be reimbursed were deferred by the court for later trial by a second jury. In view of the long delay which has already supervened since the trial of the claim-over for indemnification and the necessity for the retrial of that issue, the court recalls its earlier direction for deferral and now directs that the entire claim-over be tried or retried in a single jury trial to be held on a date fixed in the order to be ertered hereon.

NOTICE OF MOTION BY DEFENDANT AND THIRD PARTY PLAINTIFF FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

- -X

JOSEPH RODRIGUEZ,

Plaintiff,

against

OLAF PEDERSEN'S REDERI A/S,

Defendant and Third Party Plaintiff,

against

AMERICAN STEVEDORES, INC. and
A.M. KRISTOPHER CO., INC.,

Third Party Defendants.

- -X

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of William P. Kain, Jr., sworn to the 27th day of November, 1973, and upon all the pleadings and proceedings heretofore had herein the undersigned will move this Court before the Honorable Edward R. Neaher in Courtroom 9 of the United States Courthouse, 225 Cadman Plaza East, Borough of Brooklyn, City, County and State of New York on the 14th day of December, 1973 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel

NOTICE OF MOTION BY DEFENDANT AND THIRD PARTY PLAINTIFF FOR SUMMARY JUDGMENT

can be heard for an order pursuant to Rule 56(a) of the Federal Rules of Civil Procedure granting defendant and third party plaintiff summary judgment on its claim for indemnity against third party defendant, American Stevedores, Inc., and granting to defendant and third party plaintiff such other further and different relief as to the Court may seem just.

DATED: New York, New York
November 27, 1973

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant and
Third Party Plaintiff
By WILLIAM P. KAIN JR.
A Member of the Firm
One State Street Plaza
New York, New York 10004

TO:

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.
Attorneys for Third Party Defendant
American Stevedores, Inc.
801 Second Avenue
New York, New York

AFFIDAVIT OF WILLIAM P. KAIN, JR. IN SUPPORT OF MOTION BY DEFENDANT AND THIRD PARTY PLAINTIFF.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

- -X

JOSEPH RODRIGUEZ,

Plaintiff,

against

OLAF PEDERSEN'S REDERI A/S,

Defendant and Third Party Plaintiff,

against

AMERICAN STEVEDORES, INC. and
A.M. KRISTOPHER COMPANY INC.,

Third Party Defendants.

- -X

State of New York,

County of New York, ss:

WILLIAM P. KAIN, JR., being duly sworn, deposes and says:

That he is a member of the firm of Haight, Gardner, Poor & Havens, attorneys for defendant and third party plaintiff, and makes this affidavit in support of the motion for an order pursuant to Rule 56(a) of the Federal Rules of Civil Procedure granting defendant and third

party plaintiff summary judgment on its claim for indemnity against third party defendant, American Stevedores, Inc. on the ground that there is no genuine issue as to any material fact and that defendant and third party plaintiff is entitled to judgment as a matter of law.

That this was an action by plaintiff to recover damages for personal injuries which he sustained on July 3, 1967, while working as a longshoreman in the employ of third party defendant, American Stevedores, Inc., aboard the m/v Sunny Prince, a vessel owned by defendant and third party plaintiff.

At trial, plaintiff testified that on the morning of July 3, 1967, he and other longshoremen in his gang discharged frozen shrimp from a reefer box in the after part of the vessel's No. 2 upper 'tween deck. This work was concluded at approximately 11:00 a.m. at which time he received a signal to come up out of the hatch. Believing that it was time for the luncheon break and that he would, thereafter, be returning to the No. 2 hatch in order to load cargo, he left his gloves and his hook on the deck, adjacent to the after ladder leading from the No. 2 upper 'tween deck to the main deck. When he left No. 2 and began to descend the gangway to the pier, other longshoremen called him back and all members of the gang then proceeded to hatch No. 4.

AFFIDAVIT OF WILLIAM P. KAIN, JR. IN SUPPORT OF MOTION BY DEFENDANT AND THIRD PARTY PLAINTIFF

Upon arriving at No. 4 the gang uncovered the hatch square and then removed four or five hatch boards from the 'tween deck before breaking for lunch. On his return after lunch, he noted that his gang was to discharge green hides from the No. 4 lower hold. Accordingly, he requested and obtained permission from his "Header" to return to the No. 2 upper 'tween deck to retrieve his hook and gloves. Plaintiff climbed out of the lower hold of No. 4 into the 'tween deck where he noticed a door, slightly ajar, in the forward, offshore section of the No. 4 'tween deck. As he was on the same deck level on which he had worked in hatch No. 2, he assumed it was possible for him to walk through this door and forward to the No. 2 upper 'tween deck in order to retrieve his hook and gloves. He further assumed that, upon reaching the No. 2 upper 'tween deck he would find the hatch square covered on that level and the weather deck uncovered as they had been at the time he left that area in the morning. He thereupon proceeded through the door in the direction of No. 2 hatch. When he had progressed a distance of approximately 20 feet, the natural light entering the area from the open No. 4 hatch failed and it became very dark. However, using a small "penlight" which he carried attached to a key chain in his pocket, he was able to move forward without

incident until he arrived in the No. 2 hatch. He recognized No. 2 upper 'tween deck because of the reefer box from which he and other longshoremen had discharged the frozen shrimp that morning. While he was using his light to illuminate the 'tween deck in his search for his hook and gloves and while moving in a lateral direction from the offshore toward the inshore side he tripped over the 'tween deck hatch coaming and fell into the No. 2 lower hold, sustaining injuries.

That, following trial of the primary action - plaintiff against defendant and third party plaintiff - the jury returned a verdict in plaintiff's favor in the amount of $35,000. In response to specific questions, the jury found that the defendant and third party plaintiff had been negligent, the m/v Sunny Prince unseaworthy and plaintiff, himself, contributorily negligent. In response to a further question addressed by the Court, the jury announced that the total amount of plaintiff's damages had been $80,000. Thus, the jury assessed the amount of plaintiff's contributory negligence in excess of 55%.

That, based upon the jury's finding of contributory negligence, defendant and third party plaintiff moved for a directed verdict in its favor on the claim for indemnity against third party defendant, American Stevedores, Inc. The Court made no determination on the

motion and the jury subsequently returned a verdict in favor of third party defendant, stevedore, dismissing the claim for indemnity.

That, thereafter, by notice dated March 11, 1971, defendant and third party plaintiff moved for judgment, notwithstanding the jury verdict, on the indemnity issue on the grounds that the jury was bound by its prior determination that plaintiff himself was negligent; that this negligence was imputed to and binding on his employer as a matter of law in considering the shipowner's claim for indemnity and that, accordingly, defendant and third party plaintiff was entitled, as a matter of law, to judgment on its claim for indemnity. Joined with the motion for judgment notwithstanding the jury verdict was a motion for a new trial. Judge Rosling, in an opinion filed September 28, 1971, denied the motion for judgment but granted the request for a new trial.

That, with the case on the threshold of a new trial and with both parties having stated, candidly, to the Court that they are aware of no additional pertinent evidence which can be adduced at such new trial, deponent respectfully submits that all issues can be resolved by way of the instant motion for summary judgment. The

authorities upon which deponent relies in support both of this procedural approach and the merits of the motion are fully set forth in the accompanying memorandum of law.

That, in support of this motion, deponent respectfully submits that the jury's finding of contributory negligence on the part of plaintiff mandated a further finding that third party defendant had breached its warranty of workmanlike service as a matter of law, unless there be found in the record some factual basis for a further finding that the shipowner had been guilty of conduct sufficient to preclude recovery in indemnity. It is deponent's recollection that the attorney for third party defendant, in opposing the prior motion for judgment notwithstanding the verdict, pointed to no evidence in the record which would support such a finding. Deponent further submits that the record is devoid of any such evidence. Viewed in the light most favorable to third party defendant, the evidence showed, at best, that defendant and third party plaintiff negligently created an unseaworthy condition which was a proximate cause of plaintiff's accident. Specifically, this consisted of a direction by the vessel's Chief Officer to the foreman of ship cleaners employed by third party

defendant, A. M. Kristopher Co., to cover the No. 2 hatch on the weather deck and not replace such covers in the lower decks of that hatch as had been removed in the course of cleaning operations. Deponent further stipulates, for the purposes of this motion, that such action left the No. 2 hatch in total darkness and, further, that the doors of the No. 4 'tween deck, which gave plaintiff initial access back to the No. 2 hatch, were not locked, were ajar, and there were no signs warning persons, such as plaintiff, that the conditions described above, existed. Deponent submits that this synopsis reflects the total "conduct" of defendant and third party plaintiff which the trial record could support.

Deponent further submits that the trial record contains no evidence whatsoever which would support a finding that defendant and third party plaintiff had notice, actual or constructive, that plaintiff would pursue the course of action which ultimately led to his accident. The record contains absolutely no evidence that defendant and third party plaintiff actively hindered employees of American Stevedores, Inc., including plaintiff, in rendering a workmanlike performance. Indeed, the record shows a classic case of unseaworthiness brought into play by stevedore negligence - in this case that of plaintiff, himself.

AFFIDAVIT OF WILLIAM P. KAIN, JR. IN SUPPORT OF MOTION BY DEFENDANT AND THIRD PARTY PLAINTIFF

WHEREFORE, deponent prays that an order be entered herein pursuant to Rule 56(a) of the Federal Rules of Civil Procedure granting defendant and third party plaintiff summary judgment against third party defendant, American Stevedores, Inc., and granting to defendant and third party plaintiff such other, further and different relief as to the Court may seem just.

s/WILLIAM P. KAIN, JR.

Sworn to before me this
27th day of November, 1973.

MARGUERITE F. ZAMBITO
Notary Public, State of New York
No. 9786311
Qualified in Westchester County
Cert. filed with New York Co. Clerk
Term Expires March 30, 1974

STATEMENT PURSUANT TO RULE 9(g) OF THE GENERAL RULES OF THIS COURT, ATTACHED TO AFFIDAVIT OF WILLIAM P. CAIN, JR.

STATEMENT PURSUANT TO RULE 9(g) OF THE GENERAL RULES OF THIS COURT

There is no genuine issue to be tried as to the following material facts:

1. Plaintiff, Joseph Rodriguez, sustained multiple injuries on July 3, 1967, while working as a longshoreman in the employ of third party defendant, American Stevedores, Inc., aboard the m/v Sunny Prince, a vessel owned by defendant and third party plaintiff.

2. At trial, plaintiff testified that shortly after 1:00 p.m. on July 3, 1967 he proceeded through a door, slightly ajar, in the forward offshore section of the No. 4 'tween deck and made his way forward in darkness, aided only by a small "penlight", to the No. 2 upper 'tween deck where he tripped over the 'tween deck hatch coaming and fell into the lower hold, sustaining injuries.

3. At the conclusion of the trial of the named action, the jury found that defendant, shipowner, had been negligent and the m/v Sunny Prince unseaworthy but found that plaintiff's total damages of $80,000 should be reduced to $35,000 because of his contributory negligence or in excess of 55%.

STATEMENT PURSUANT TO RULE 9(g) OF THE GENERAL RULES OF THIS COURT, ATTACHED TO AFFIDAVIT OF WILLIAM P. CAIN, JR.

4. From the testimony and jury findings at the first trial, defendant and third party plaintiff stipulates, for the purposes of this motion, that it negligently created an unseaworthy condition which was a proximate cause of plaintiff's accident in that: The vessel's Chief Officer directed the foreman of ship cleaners employed by third party defendant, A. M. Kristopher Co., to cover the No. 2 hatch on the weather deck and not replace such covers in the lower decks of that hatch as had been removed during the course of cleaning operations; that such action left the No. 2 in total darkness and that the doors of the No. 4 'tween deck, which gave plaintiff initial access back to the No. 2 hatch, were not locked, were ajar, and there were no signs warning persons, such as plaintiff, that the conditions described above, existed.

5. There was no other evidence which could conceivably support the contention of third party defendant, American Stevedores, Inc., that defendant and third party plaintiff was guilty of conduct sufficient to preclude recovery in indemnity.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant and
Third Party Plaintiff
By
A Member of the Firm
One State Street Plaza
New York, New York 10004

NOTICE OF MOTION BY THIRD PARTY DEFENDANT
AMERICAN STEVEDORES, INC.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

- -X

JOSEPH RODRIGUEZ,

Plaintiff,

against

OLAF PEDERSEN'S REDERI A/S,

Defendant and Third Party Plaintiff,

against

AMERICAN STEVEDORES, INC., and
A.M. KRISTOPHER CO., INC.,

Third Party Defendants.

- -X

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of JOSEPH ARTHUR COHEN, sworn to the 6th day of February, 1974, the affidavit of WILLIAM P. KAIN, JR., sworn to the 27th day of November, 1973, the verdict received from the jury herein on February 26, 1971, the verdict received from the jury herein on March 1, 1971, and the decision and order of Judge Rosling dated September 24, 1971 and filed herein on September 28, 1971, and upon all the pleadings and proceedings heretofore had herein, the

NOTICE OF MOTION BY THIRD PARTY DEFENDANT
AMERICAN STEVEDORES, INC.

undersigned will move this Court before the HON. EDWARD R. NEAHER, in Courtroom 9 of the United States Courthouse, 225 Cadman Plaza East, Borough of Brooklyn, City and State of New York on the 22nd day of February, 1974 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order pursuant to Rule 60(b) recalling that portion of Judge Rosling's order of September 24, 1971 as grants a new trial of the issues raised by the indemnity claim, and for an order entering judgment in favor of the third party defendant, AMERICAN STEVEDORES, INC. against the third party plaintiff, OLAF PEDERSEN'S REDERI A/S, in accordance with the jury verdict received on March 1, 1971; and for such other, further and different relief as to this Court may seem just and proper.

s/JOSEPH ARTHUR COHEN
Member of the Firm of
ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for Third Party
Defendant
American Stevedores, Inc.
801 Second Avenue
New York, N. Y. 10017

TO:

HAIGHT, GARDNER, POOR & HAVENS, ESQS.
Attorneys for Third Party Plaintiff
One State Street Plaza
New York, N. Y.

AFFIDAVIT OF JOSEPH ARTHUR COHEN IN SUPPORT OF THIRD PARTY DEFENDANT'S MOTION.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

----------X

JOSEPH RODRIGUEZ,

Plaintiff,

against

OLAF PEDERSEN'S REDERI A/S,

Defendant and Third Party Plaintiff,

against

AMERICAN STEVEDORES, INC., and
A.M. KRISTOPHER CO., INC.,

Third Party Defendants.

----------X

State of New York,
County of New York, ss:

JOSEPH ARTHUR COHEN, being duly sworn deposes and says:

That he is a member of the firm of ALEXANDER, ASH, SCHWARTZ & COHEN, attorneys for the third party defendant, AMERICAN STEVEDORES, INC., and that he is fully familiar with all the pleadings and proceedings heretofore had herein.

AFFIDAVIT OF JOSEPH ARTHUR COHEN IN SUPPORT OF THIRD PARTY DEFENDANT'S MOTION

Following a full trial on the merits, a jury verdict in favor of the third party defendant, AMERICAN STEVEDORES, INC. and against the third party plaintiff, OLAF PEDERSEN'S REDERI A/S (hereinafter Shipowner) was returned on March 1, 1971. The Shipowner thereafter moved, in the alternative, for judgment in its favor notwithstanding the verdict, or for a new trial of the issues raised by the indemnity claim.

By decision and order dated September 24, 1971 and filed on September 28, 1971, Judge Rosling denied the Shipowner's motion for judgment notwithstanding the verdict, but granted the alternative motion for a new trial. A reading of the aforesaid decision and order indicates that it was granted because Judge Rosling felt that there might be some further factual development regarding the open passageway door. Judge Rosling stated:

> "The question is a close one and should be presented to a jury in the form of an interrogatory calling for a written answer. *Counsel should perhaps provide the jury with factual enlightenment by evidence of the physical situation with focus directed to the door.*"
> (Italics added).

AFFIDAVIT OF JOSEPH ARTHUR COHEN IN SUPPORT OF THIRD PARTY DEFENDANT'S MOTION

Although it alternatively moved for a new trial, the Shipowner now states that on such new trial it will not present any evidence beyond that presented on the first trial. Thus, Shipowner's attorney, William P. Kain, Jr., on Page 4 of his affidavit of November 27, 1973 in support of the Shipowner's pending motion for summary judgment states that he is "aware of no additional pertinent evidence which can be adduced at such new trial."

Since the Shipowner does not intend to avail itself of the opportunity given to it by Judge Rosling to present such further evidence, it is respectfully submitted that no purpose would be served by a new trial other than to have the record of the first trial read to a different jury. There is no reason whatever why the Shipowner should thus be given two bites at the apple. As questions of fact were presented by the Shipowner's indemnity claim, it is quite conceivable that a different jury could resolve those issues differently. But the purpose of a new trial is not to perpetuate litigation until finally some jury is found which determines the factual issues differently than the first jury.

Amittting, as it now does, that it will not offer any additional pertinent evidence upon a new trial, the Shipowner renders Judge Rosling's *desideratum* for such new trial academic, and waives its rights to the same.

AFFIDAVIT OF JOSEPH ARTHUR COHEN IN SUPPORT OF THIRD PARTY DEFENDANT'S MOTION

As the brief in support of this motion will indicate, this recent affidavit in behalf of the Shipowner that no further pertinent proof would be adduced by it upon a new trial brings this matter within the purview of Rule 60(b) of the Federal Rules of Civil Procedure. This Court is thus empowered to recall the order granting a new trial and to have judgment entered in accordance with the jury verdict in favor of the third party defendant and against the third party plaintiff. The third party plaintiff will then be able to appeal from the entry of such judgment based upon the jury verdict and to properly bring before the Circuit Court its contentions that it is entitled to judgment over as a matter of law.

WHEREFORE, your deponent respectfully requests that the instant motion be granted and that the order granting a new trial herein be recalled or vacated and judgment entered on the jury verdict in favor of the third party defendant against the third party plaintiff.

JOSEPH ARTHUR COHEN

Sworn to before me this
6th day of February, 1974

PAUL KLEIN
Notary Public, State of New York
No. 24-2142860
Qualified in Kings County
Commission Expires March 30, 1975

STATEMENT PURSUANT TO RULE 9(g) IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

----------X

JOSEPH RODRIGUEZ,

Plaintiff,

against

OLAF PEDERSEN'S REDERI A/S,

Defendant and Third Party Plaintiff,

against

AMERICAN STEVEDORES, INC. and
A.M. KRISTOPHER CO., INC.,

Third Party Defendants.

----------X

STATEMENT PURSUANT TO RULE 9(g) IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT.

A genuine issue of fact exists herein as follows:

The acts and omissions to act on the part of the Shipowner (Third Party Plaintiff) have already been determined by a jury to constitute negligence, and that negligence has been determined by the same jury to have been a proximate cause of the plaintiff's injuries.

STATEMENT PURSUANT TO RULE 9(g) IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

No appeal was taken from those jury determinations, and the Shipowner is bound by the same. There thus remains a further factual issue as to whether that self same negligence on the part of the Shipowner constitutes conduct precluding indemnity.

If, however, on the other hand, the Shipowner is not bound by the jury determination of its negligence, then it would follow that the Stevedore is not bound by the jury determination of the plaintiff's contributory negligence. In that situation, there would be a further factual issue of whether or not the Stevedore breached its implied warranty of workmanlike performance.

Our position is that both the Shipowner and the Stevedore are bound by the jury determinations of Shipowner's negligence and plaintiff's contributory negligence, and that those findings evidence the existence of a factual issue on indemnity precluding conduct. If, however, the Court should not consider the Shipowner bound by the jury determination of Shipowner's negligence, then we submit that the Stevedore should not be

STATEMENT PURSUANT TO RULE 9(g) IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

considered bound by the jury determination of plaintiff's contributory negligence and a further factual issue would thus be created.

JOSEPH ARTHUR COHEN
A Member of the Firm of
ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for Third Party
Defendant
American Stevedores, Inc.
801 Second Avenue
New York, N.Y. 10017

JOSEPH ARTHUR COHEN
Of Counsel.

MEMORANDUM AND ORDER BY EDWARD R. NEAHER, U.S.D.J.
DATED DECEMBER 27, 1974.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HAIGHT, GARDNER, POOR & HAVENS
ONE CHASE MANHATTAN PLAZA, NEW YORK
12/2/75
ENTERED
BY: RF

JOSEPH RODRIGUEZ,

Plaintiff,

-against-

68 C 409

OLAF PEDERSEN'S REDERI A/S,

Defendant and
Third Party Plaintiff,

-against-

MEMORANDUM
AND
ORDER

AMERICAN STEVEDORES, INC. and
A. M. KRISTOPHER CO., INC.,

Third Party Defendants.

APPEARANCES:

HAIGHT, GARDNER, POOR & HAVENS, ESQS.
Attorneys for Defendant and
Third-Party Plaintiff
By W. P. KAIN, JR. and THOMAS F.
MOLANPHY, ESQS.

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.
Attorneys for Third-Party Defendant
By JOSEPH ARTHUR COHEN, ESQ.

NEAHER, District Judge.

This action was originally instituted by a longshoreman (Rodriguez) to recover damages from defendant shipowner (Pedersen) for injuries he sustained while

MEMORANDUM AND ORDER BY EDWARD R. NEAHER, U.S.D.J.
DATED DECEMBER 27, 1974

aboard the latter's ship. Pedersen, in turn, impleaded Rodriguez's employer, American Stevedores, Inc. (American) seeking indemnification for the monetary damages Pedersen was required to pay to Rodriguez. The case is now before the court solely on the indemnity claim; but in order to better understand the questions presented, the prior proceedings and present posture of the case will be briefly stated.

After a trial in 1971 before the late Judge Rosling of this court, the jury returned a verdict in favor of Rodriguez against Pedersen in the amount of $35,000. In answer to special interrogatories, the jury found the ship unseaworthy and the shipowner negligent but also found Rodriguez contributorily negligent and reduced his damages from $80,000 to the amount announced. Upon subsequent submission of Pedersen's claim for indemnity, the jury returned a separate verdict in favor of American, denying Pedersen a recovery over. Pedersen then moved for judgment n.o.v. or a new trial on the indemnity claim. Judge Rosling granted Pedersen the new trial.[1]

Pedersen has now moved for summary judgment on its indemnity claim, asserting that there are no new facts

to be adduced at a new trial and that on the facts as brought out on the first trial, it is entitled to judgment as a matter of law. American opposes Pedersen's motion and has cross-moved under Rule 60(b), F.R.Civ.P., to set aside the order granting Pedersen a new trial and for reinstatement of the jury verdict denying indemnity. In so moving, American also acknowledges "that no purpose would be served by a new trial other than to have the record of the first trial read to a different jury."[2] In short, both sides agree that all relevant facts are before the court.[3]

Before turning to the facts, the somewhat unusual posture of the case requires threshold consideration of the propriety of entertaining a motion for summary judgment at this juncture. The indemnity claim clearly remains as a completely separate action, having been "severed and deferred for later jury trial" by Judge Bonsing.[4] Although such a trial was had, no judgment has ever been entered determining the action. The jury's verdict denying indemnity was set aside and a new trial ordered with a strong suggestion that the existing evidence was insufficient to support such a verdict.[5] The parties say that

additional evidence does not exist. A judgment deciding the case one way or the other would seem to be in order.

American, in opposing the use of summary judgment procedure, suggests that the court merely "recall the order granting a new trial" and direct entry of judgment on the vacated jury verdict in its favor.[6] It contends that Judge Roeling having denied Pedersen's motion for judgment notwithstanding the verdict, the latter's declared intention not to offer additional proof is a waiver of its right to a new trial. Consequently, American argues, it should be relieved of the new trial order under Rule 60(b), the jury verdict in its favor should be reinstated, and judgment should be entered accordingly.[7]

Aside from the technical difficulties American's Rule 60(b) contentions present,[8] the court sees only two routes to an appealable judgment on the indemnity claim: (1) resubmission of the same evidence to a new jury, which neither party desires and which seems to make no sense here; or (2) re-examination by the court of the facts not in dispute, whether established by jury verdict or otherwise, to determine if judgment on the merits can be rendered as a matter of law. Pedersen's motion for

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summary judgment urges route (2) and impresses the court as the better course.

Although a judge should not ordinarily disturb previous rulings of another judge in the same case, "the law of the case" rule is not so inflexible as to permit of no exception. Certainly it should not prevent the discharge of a judge's obligation to present an appellate court with the judgment he believes ought to be rendered in the case. Dictograph Products Co. v. Sonotone Corp., 230 F.2d 131 (2 Cir.), appeal dism. 352 U.S. 883 (1956), cited by Pedersen, supports such a view. See also Petition of Kinsman Transit Company, 388 F.2d 821 (2 Cir. 1968), fn. 9 at p. 825; Ross Products, Inc. v. New York Merchandise Co., 242 F. Supp. 878 (S.D.N.Y. 1965); Kaminsky v. Abrams, 281 F. Supp. 501 (S.D.N.Y. 1968); Rogers v. Valiente, 426 F.2d 1361 (2 Cir. 1970), fn. 2 at p. 1363.

Finding no sound reason for holding that the prior rulings herein bar reconsideration of the merits of Pedersen's claim, we now examine what the parties agree are the facts which gave rise to that claim.

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On July 3, 1967, Rodriguez and other members of his gang were discharging cargo from Pedersen's M/V "Sunny Prince." The gang was working on the upper 'tween deck level of hatch #2, when Rodriguez was summoned from that hatch at about 11:00 a.m. and directed to hatch #4 to do some unloading. When Rodriguez left hatch #2 he left his gloves and hook there, anticipating that he would return to work in that hatch. Shortly after arriving at hatch #4, he realized he would not be returning to hatch #2, and after having his lunch, he requested permission from his superior to go back to hatch #2 to retrieve his gloves and hook.

Meanwhile, unknown to Rodriguez, ship's cleaners in the employ of A. M. Kristopher Co., Inc., had gone into hatch #2 to clean out the debris remaining after the completion of the unloading. In order to do so it was necessary for them to remove the covers from the upper 'tween deck. After they had completed the task, they asked the ship's chief officer whether they should replace the covers and were told by him not to do so. He also instructed them to close the main deck hatch opening. This, of course, left the #2 upper 'tween deck level in

total darkness with a previously covered floor aperture now open.

As Rodriguez proceeded from hatch #4 to hatch #2, he walked through a door which had been left ajar and which gave access to a passageway connecting the two hatches at the 'tween deck level. Concededly there were no signs giving notice of the changed conditions in hatch #2. As it was dark in the passageway, Rodriguez used a small "penlight" for illumination. After arriving in the #2 hatch 'tween deck area, he tripped over the hatch coaming and fell through the uncovered opening into the lower hold, thereby sustaining his injuries.

Until Congress, in 1972, revised the statutory provision relating to actions of this nature,[9] the law in this circuit was well established that a finding of contributory negligence on the part of a plaintiff longshoreman caused his employer, the stevedore company, to be held liable per se to indemnify the defendant shipowner. Hartnett v. Reina Steamship Company, 421 F.2d 1011, 1018 (2 Cir.), cert. denied, 400 U.S. 832 (1970); McLaughlin v. Trelleborgs Angfartygs A/B, 408 F.2d 1334, 1336 (2 Cir.), cert. denied, [illegible]

Glittre, 348 F.2d 383 (2 Cir. 1965),[11] absent a finding that the shipowner prevented the stevedore company from fulfilling its warranty of workmanlike performance, Weyerhaeuser S.S. Company v. Nacirema Operating Company, Inc., 355 U.S. 563, 567 (1958).

Here, it is undisputed that upon the liability trial, the jury found plaintiff's contributory negligence to be in excess of 55%. Without more, Pedersen would be entitled to a judgment over against American. A jury on the same evidence, however, denied the shipowner indemnity when that issue was presented to it.

Endeavoring to resurrect that verdict, American strenuously argues that "the jury determinations of shipowner's negligence and [Rodrigues's] contributory negligence . . . evidence the existence of a factual issue on indemnity precluding conduct," n. 4 supra.

While it is true that "the issue of whether the shipowner has precluded itself is an issue of fact," Murdich v. Eastmount Shipping Corp., ___ F.2d ___ (2 Cir. September 12, 1974) (Slip Op. at 5416, n. 3), this is not to be taken as barring judicial evaluation of the sufficiency of the evidence relied on to support a finding that

the shipowner should be denied indemnity. Indeed, it seems manifest that Judge Rosling set the jury's verdict aside and ordered a new trial because he viewed the existing evidence as insufficient to warrant such a denial.[12] In effect, the stevedore -- not the shipowner -- was given a second opportunity to develop facts to support its contention that indemnity should be denied.

On this motion the parties are in agreement that there is no additional evidence. The court must, therefore, decide anew whether on the essentially conceded facts a jury could reasonably infer that Pedersen's part in Rodriguez's accident constituted "conduct on its part sufficient to preclude recovery" of indemnity from American. Weyerhaeuser, supra, 355 U.S. at 567.

Exactly what constitutes conduct sufficient to preclude recovery was not explained in Weyerhaeuser. Cases in this circuit, while not striving for a precise definition, have established a meaningful parameter. Thus, in Albanese v. M.V. Nadezhda Amerik Steamer, Boats, 346 F.2d 481, 484 (2 Cir.), rev'd on other grounds, 382 U.S. 283 (1965), the Court of Appeals stated:

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DATED DECEMBER 27, 1974

> "Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough . . . ."

The above-quoted language was later approved in Mortensen v. A/S Glittre, supra, in which a jury found for Mortensen, a painter, against the shipowner but reduced its verdict by approximately one-third because of Mortensen's contributory negligence. The trial court then directed a verdict on an indemnity claim in favor of the shipowner against Mortensen's employer, a ship-painting contractor, on the theory that the jury's finding of contributory negligence mandated a finding as a matter of law that the employer had breached its warranty of workmanlike performance.

On appeal, the employer argued that the question of whether the shipowner's conduct was a bar to recovery should have been left to the jury. The Court of Appeals rejected the contention in language apposite here:

> "It is well established that the mere creation of the unsafe condition is insufficient to preclude recovery over when the contractor's own negligence has brought the unseaworthiness of the vessel into play. E.g., Crumady v. J. H. Fisser, 358 U.S. 423.

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79 S. Ct. 445, 3 L.Ed.2d 413 (1959).

> "Despite every opportunity to do so during the course of the trial, no effort was made to show and no claim was made that Glittre's conduct consisted of anything more than the creation of the hazard which underlay the unseaworthiness claim, let alone that it amounted to 'active hindrance' of the contractor in the performance of its contractual duties, which as we stated in Albanese, supra, . . . is required to defeat the indemnification action." 348 F.2d at 385.

Requiring an active hindrance by the shipowner of the stevedore's performance is, manifestly, an appropriate standard in view of the fact that the stevedore's warranty is founded in contract, and not tort, law. Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964). We are thus concerned not with weighing relative degrees of fault but with ascertaining causation in fact, i.e., whether the shipowner's conduct, as imputed from its employees, actually interfered with the proper performance of the stevedore's job.

In deciding this question of causation, the trier of the facts is charged by the Court in Italia, supra, to place liability "upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury" (376 U.S. at 324). See Rundich v. Eastmount

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Shipping Corp., supra, Slip Op. at 5416.

Here, a finding of fault on Pedersen's part must necessarily center around the creation by the ship's own officer of a potentially hazardous condition in hatch #2. This trap for the unwary is reminiscent of the oil "slick" in Mortensen, supra. In Mortensen it was the careless failure of the plaintiff workman to obey a direction to clean up any "slick" observed which brought about the chain of events resulting in the accident. Here, too, it was Rodriguez's own careless action in walking into the darkened hatch which brought about his injuries.

In this case there is a total absence of evidence warranting an inference that the creation of the hazard constituted interference by the shipowner with the stevedore's fulfillment of his warranty of workmanlike performance. Rodriguez did not enter hatch #2 in order to perform any assigned task. Pedersen had no reason to expect longshoremen to be in that hold, since the stevedores' work there had been completed. And if the Italia test is to be applied, Rodriguez and his gang boss were best situated to avoid the danger by inspection of the area with an adequate light.

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DATED DECEMBER 27, 1974

In Bertino v. Polish Ocean Line, 402 F.2d 863, 866 (2 Cir. 1968), the court noted:

> "Even if the danger was created by the shipowner, indemnity over is permitted if the condition was obvious and the stevedore continued to work of did not correct it."

That language is also apposite here. Even though the darkened condition in hatch #2 was created by Pedersen, it presented an obviously dangerous situation to Rodriguez, calling for the exercise of caution and the use of an adequate light. He nevertheless entered the hatch aided only by a "penlight." Rodriguez's own careless action having brought the danger into play, the shipowner may not be denied indemnity for having created the danger. See United States Lines, Inc. v. Jarka Corp., 444 F.2d 26 (4 Cir. 1971); H&M Ship Service Co. v. Weyerhaeuser Line, 382 F.2d 711 (9 Cir. 1967).

Evaluating the facts of this case against the standards of causation established by Hartnett-McLaughlin-Mortensen, supra, it seems clear that the concurrent fault of Pedersen cannot be said to have prevented or handicapped the stevedore in his ability to do a workmanlike job, and that no jury verdict denying indemnity to the shipowner would be legally sustainable.

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DATED DECEMBER 27, 1974

Pedersen's motion for summary judgment is accordingly granted, the form of judgment to be settled by the parties on notice.

So ordered.

/s/ EDWARD R. NEAHER
U. S. D. J.

Dated: Brooklyn, N.Y.
December 27, 1974

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DATED DECEMBER 27, 1974

FOOTNOTES

1 Judgment was entered for plaintiff on the jury verdict and was not appealed. Judge Roeling died before a new trial could be commenced and the case was subsequently reassigned to the writer.

2 Affidavit in Support of Third Party Defendant's Motion, dated February 6, 1974, at 2.

3 In its statement pursuant to General Rule 9(g) of this court, Pedersen stipulated that:

> "4. From the testimony and jury findings at the first trial, defendant and third party plaintiff stipulates, for the purposes of this motion, that it negligently created an unseaworthy condition which was a proximate cause of plaintiff's accident in that: The vessel's Chief Officer directed the foreman of ship cleaners employed by third party defendant . . . to cover the No. 2 hatch on the weather deck and not replace such covers in the lower decks of that hatch as had been removed during the course of cleaning operations; that such action left the No. 2 in total darkness and that the doors of the No. 4 'tween deck, which gave plaintiff initial access back to the No. 2 hatch, were not locked, were ajar, and there were no signs warning persons, such as plaintiff, that the conditions described above, existed."

American does not dispute any of the foregoing facts or claim there are any additional facts. All that American says in its Rule 9(g) statement is that:

> "Our position is that both the Shipowner and the Stevedore are bound by the jury determinations of Shipowner's negligence and plaintiff's contributory negligence, and that those findings

evidence the existence of a factual issue on indemnity precluding conduct." Affidavit of Joseph Arthur Cohen, Esq.

[4] See Decision and Order ("Decision") filed September 28, 1971, at 2.

[5] Decision at 4-5.

[6] Affidavit in Support of Third Party Defendant's Motion, dated February 6, 1974, at 3.

[7] Brief in Support of Third Party Defendant's Motion under Rule 60 at 2.

[8] Defendant and Third Party Plaintiff's Memorandum of Law, etc. at 3-4.

[9] 33 U.S.C. §905(a) and (b) now provide in pertinent part:

> "(a) The liability of an employer prescribed in section 904 of this title shall be exclusive . . . .
>
> "(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party . . . and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void . . . ."

The instant action involves injuries sustained prior to the effective date of the statutory provision and is thus not governed thereby. See Julian v. Mitsui O.S.K. Lines Ltd., 479 F.2d 433, 434 (5 Cir. 1973).

[10] Sub nom Galtea Marine Company v. Trelleborgs Ag[illegible].

[11] The theory behind this vicarious imposition of liability is that the employer warrants "to furnish employees who . . . will not negligently expose themselves to injury." McLaughlin, supra, 408 F.2d at 1337.

[12] Decision at 4-5.

JUDGMENT.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

- -X

JOSEPH RODRIGUEZ,

Plaintiff,

against

OLAF PEDERSEN'S REDERI A/S,

Defendant and Third Party Plaintiff,

against

AMERICAN STEVEDORES, INC. and
A.M. KRISTOPHER CO., INC.,

Third Party Defendants.

- -X

Defendant and third party plaintiff, above named, by its attorneys, Haight, Gardner, Poor & Havens, having moved this Court by Notice of Motion dated November 27, 1973, for an order pursuant to Rule 56(a) of the Federal Rules of Civil Procedure for summary judgment on defendant and third party plaintiff's claim for indemnity against third party defendant, American Stevedores, Inc., and the Court having read the affidavit of William P. Kain, Jr., Esq., sworn to the 27th day of November, 1973 in support thereof and the affidavit of Joseph Arthur Cohen, Esq., sworn to the 6th day of February, 1974 in

opposition thereto and third party defendant, American Stevedores, Inc., by its attorneys, Alexander, Ash, Schwartz & Cohen, having moved this Court for an order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure re-instating the jury verdict of March 1, 1971 in favor of American Stevedores, Inc. on the indemnity claim of defendant and third party plaintiff and the Court having read the affidavit of Joseph Arthur Cohen, Esq., sworn to the 6th day of February, 1974 in support thereof and the Court having further heard oral argument of counsel in support of and in opposition to both said motions and due deliberation having been had thereon as well as on the authorities submitted by the parties in their various memoranda of law, and the Court, in its opinion dated December 27, 1974, having determined that the motion of defendant and third party plaintiff should be granted and that the motion of third party defendant should be denied,

NOW, on motion of Haight, Gardner, Poor & Havens, attorneys for defendant and third party plaintiff it is,

ORDERED, ADJUDGED AND DECREED that

JUDGMENT

(1) Defendant and third party plaintiff's motion for summary judgment against third party defendant, American Stevedores, Inc., be and the same is hereby granted;

(2) Defendant and third party plaintiff have judgment against third party defendant, American Stevedores, Inc., in the amount of $37,094.60, the full amount of plaintiff's recovery including interest and costs as taxed, plus interest at 6% per annum from January 27, 1972, the date said judgment was satisfied, and, in addition thereto, reasonable counsel fees, costs and disbursements incurred in the defense of plaintiff's claim;

(3) The respective amounts of recoverable counsel fees and disbursements may be added to the foot hereof in sums to be agreed upon or, failing such agreement, in such sums as may be fixed by the Court;

(4) That the motion of third party defendant, American Stevedores, Inc., be and the same is hereby denied.

DATED: Brooklyn, New York
February 3, 1975

s/EDWARD R. NEAHER
U.S.D.J.

NOTICE OF APPEAL.

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TFM

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
ONE STATE STREET PLAZA NEW YORK
3/5/75
ENTERED
BY: RE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------X

JOSEPH RODRIGUEZ,

Plaintiff,

-against-

OLAF PEDERSEN'S REDERI A/S,

Defendant and Third Party Plaintiff,

-against-

AMERICAN STEVEDORES, INC. and A.M. KRISTOPHER CO., INC.,

Third Party Defendants.

----------X

NOTICE OF APPEAL

INDEX NO. 68 C 409

S I R S :

PLEASE TAKE NOTICE that the third party defendant, American Stevedores Inc., hereby appeals from the judgment entered herein in the office of the clerk of this Court on February 4, 1975, and that said third party defendant appeals from each and every part of said judgement, as well as the whole thereof.

Dated: New York, New York

March 4, 1975

Member of Firm
of
ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for third-party
defendant, American Stevedores, Inc.
801 Second Avenue

3 copies rec'd 5-7-25
Alexander & Schwartz Cohn
Atty for appellant